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No. 22 Original

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

STATE OF SOUTH CAROLINA,
Plaintiff,

vs.

NICHOLAS deB. KATZENBACH, Attorney General of the United States,
Defendant.

BRIEF FOR THE STATE OF MISSISSIPPI, AMICUS CURIAE

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INDEX

Authority for the Filing of Amicus Curiae Brief 1

Interest of the Amicus 2

Request for Permission to Participate in Oral Argument 2

Summary of Argument 3

Argument—

I. By the Constitution, the People of the Several States Created a Central Government of Limited, Enumerated Powers 6

II. The Fifteenth Amendment Does Not Vest Authority in Congress to "Suspend" State Literacy Qualifications 10

A. "Suspension" of the State Literacy Qualifications for Voting Is Not APPROPRIATE under the Fifteenth Amendment in the Light of the Legislative History of That Amendment, Which Discloses That the Fortieth Congress Considered at Length, but Refused to Include in the Amendment, a Prohibition of Literacy Qualifications 10

B. The New Right Which the 15th Amendment Conferred upon Male Citizens Was the Right to Vote IN ACCORDANCE WITH STATE LAW, Free from Denial or Abridgement on Account of Race 15

C. There Is No Repugnance or Conflict Between the Power of State to Fix a Literacy Requirement for Electors and the Prohibition of the 15th Amendment 24

D. A "Suspension" of the Paramount Power of the States to Fix Reasonable and Non-Discriminatory Voter Qualifications and to Make Reasonable Changes in Such Qualifications Must Be Based upon Authority to Destroy That Power 30

III. Neither Misapplication by an Executive Officer nor Improper Motive or Purpose on the Part of a Legislator Can Operate to Negate a Statute Which Is in Fact Constitutionally Valid 32
Cases Distinguished 38
IV. The Voting Rights Act of 1965 Is a Bill of Attainder 46
A. In Enacting the Voting Rights Act Congress Purported to Exercise Purely Judicial Powers and to Vest Legislative Powers in the Courts 46
B. Legislative Trials Are Abhorrent to the Constitutional Principles of Separation of Powers and Due Process 50
C. The Act Was Drafted to Apply to Known, Named States and Subdivisions Alone and Its Purported "Formula" Is Merely a Sophisticated Subterfuge 69
D. The Creation of an Irrational, Irrebuttable Presumption Results in Legislative Conviction and Forfeiture of Sovereign Rights Without Judicial Proceedings 71
V. The Constitution Does Not Permit the Classification of States 76
Conclusion 80
Appendix—
Mississippi Code, as amended June 30, 1965 ..... A1

TABLE OF CASES

Albertson et al. v. *SACB*, No. 3, Oct. Term 1965, 11/15/65 68
Anthony v. *Halderman*, (1871) 7 Kan. 50, 60 ..... 14, 18
Aptheker et al. v. *Secretary of State*, 378 U.S. 500, 508, 84 S.Ct. 1659, 12 L.Ed.2d 922 ..... 49, 68
Bailey v. *Drexel Furniture Co.*, 259 U.S. 20, 42 S.Ct. 449, 66 L.Ed. 817, 21 A.L.R. 1432 25
Bell v. *Maryland*, 378 U.S. 226, 84 S.Ct. 1814, 12 L.Ed. 2d 822 66

Burnet v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 52 S.Ct. 443, 76 L.Ed. 815 25
Cameron v. *Johnson*, ... U.S. ....., ... S.Ct. ....., 14 L.Ed.2d 715 62
Carrington v. *Rash*, ... U.S. ....., 85 S.Ct. 775, 13 L.Ed. 2d 675 ..... 13, 16
Carter v. *Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 47
Chastleton Corp. v. *Sinclair*, 264 U.S. 543, 44 S.Ct. 405, 68 L.Ed. 841 65
Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 25
Collector v. *Day*, 78 U.S. (11 Wall.) 113, 20 L.Ed. 122 25
Coyle v. *Smith*, 221 U.S. 559, 31 S.Ct. 688, 55 L.Ed. 853 ..... 25, 79
Cummings v. *State of Missouri*, 71 U.S. (4 Wall.) 277, 18 L.Ed. 356 57
Davis v. *Schnell*, 81 F.Supp. 872, Aff. 336 U.S. 933, 69 S.Ct. 749, 93 L.Ed. 1093 41
Duke Power Co. v. *Greenwood County*, 91 F.2d 665, 672, Aff. 302 U.S. 485, 58 S.Ct. 306, 82 L.Ed. 381 34
Ellis v. *U. S.*, 206 U.S. 246, 256, 27 S.Ct. 600, 51 L.Ed. 1047, 11 Ann. Cas. 589 35
Escanaba and Lake Michigan Transportation Co. v. *City of Chicago*, 107 U.S. 678, 2 S.Ct. 185, 193, 27 L.Ed. 442 78
Ex parte Garland, 71 U.S. (4 Wall.) 333, 18 L.Ed. 366....32, 57
Ex parte Grossman, 267 U.S. 87, 45 S.Ct. 332, 69 L.Ed. 527, 38 A.L.R. 31 10
Florida Lime and Avocado Growers v. *Paul*, 373 U.S. 132, 929, 83 S.Ct. 1210, 10 L.Ed.2d 248 26
Gainey v. *United States*, 380 U.S. 63, ... S.Ct. L.Ed.2d 73
Giles v. *Harris*, 189 U.S. 475, 487, 23 S.Ct. 639, 47 L.Ed. 909 34
Gomillion v. *Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110; 167 F.Supp. 405, 270 F.2d 594 43
Greene v. *McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed. 2d 1377 64

Grosjean v. *American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 66
Guinn v. *U. S.*, 283 U.S. 347, 362, 35 S.Ct. 926, 59 L.Ed. 1340 ..... 27, 40
Hale v. *Wisconsin*, 103 U.S. 5, 11, 26 L.Ed. 302 7-8
Hannah v. *Larche*, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307 63
Hepburn v. *Griswold*, 75 U.S. (8 Wall.) 603, 611, 19 L.Ed. 513 51
Hodges v. *United States*, 203 U.S. 1, 27 S.Ct. 6, 51 L.Ed. 65 25
Hopkins Federal Savings & Loan Assn. v. *Cleary*, 296 U.S. 315, 56 S.Ct. 235, 80 L.Ed. 251, 100 A.L.R. 1403 25
Hunt v. *Richards*, (1868) 4 Kan. 549 14
Huron Portland Cement Co. v. *Detroit*, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852, 78 A.L.R.2d 1294 27
In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 47
James v. *Bowman*, 190 U.S. 127, 23 S.Ct. 678, 47 L.Ed. 979 25
Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U.S. 123, 146, 71 S.Ct. 624, 95 L.Ed. 817 52
Karem v. *United States*, 121 F. 258 (CCA 6th, 1903) 21
Kilbourn v. *Thompson*, 103 U.S. (13 Otto) 168, 190, 26 L.Ed. 377 50
Lane v. *Wilson*, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281 ..... 40, 43
Lassiter v. *Northampton County Board of Elections*, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072 ..... 27, 63
Linder v. *United States*, 268 U.S. 5, 17, 45 S.Ct. 446, 69 L.Ed. 819, 39 A.L.R. 229 8
Lindsley v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 36
Martin v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 325, 4 L.Ed. 97 7
Maxwell v. *Dow*, 176 U.S. 581, 20 S.Ct. 448, 44 L.Ed. 597 10
McCabe v. *Atchison, Topeka & Santa Fe Railway Co.*, 235 U.S. 151, 35 S.Ct. 69, 59 L.Ed. 169 80

McCulloch v. *Maryland*, 17 U.S. (4 Wheat.) 316, 403, 405 and 423, 4 L.Ed. 579 ..... 7, 76
McGowan v. *Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 36
McKay v. *Campbell*, (D.C. Or., 1870) 16 Fed.Cas. 157, 160, Case #8839 ..... 14, 17
McPherson v. *Blacker*, 146 U.S. 1, 13 S.Ct. 3, 36 L.Ed. 869 16
Minor v. *Happersett*, 88 U.S. (21 Wall.) 162, 22 L.Ed. 627 16
Muller v. *Oregon*, 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551, 13 Ann. Cas. 957 8-9
Nashville, C. & St. L. Ry. Co. v. *Browning*, 310 U.S. 362, 60 S.Ct. 968, 84 L.Ed. 1254 44
Newberry v. *U. S.*, 256 U.S. 232, 41 S.Ct. 469, 65 L.Ed. 913 25
Oregon-Wisconsin Timber Holding Co. v. *Coos County*, (1914) 71 Ore. 462, 142 P. 575, 576 22
Parker v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 ..... 26, 31
Permoli v. *Municipality No. 1 of the City of New Orleans*, 44 U.S. (3 How.) 589, 610, 11 L.Ed. 739 77
Pollard et al. v. *Hagan et al.*, 44 U.S. (3 How.) 212, 224, 11 L.Ed. 565 77
Railroad Retirement Bd. v. *Alton Railroad Co.*, 295 U.S. 330, 346, 347, 55 S.Ct. 758, 79 L.Ed. 1468 8
Railway Express Agency v. *Virginia*, 358 U.S. 434, 79 S.Ct. 411, 3 L.Ed.2d 450 31
Rast v. *Van Deman & Lewis Co.*, 240 U.S. 342, 36 S. Ct. 370, 60 L.Ed. 679 36
Reynolds v. *Simms*, 377 U.S. 533, 595, 84 S.Ct. 1362, 12 L.Ed.2d 506 13
Rhode Island v. *Massachusetts*, 37 U.S. (12 Pet.) 657, 9 L.Ed. 1233 10
Sinnot v. *Davenport*, 63 U.S. (22 How.) 227, 16 L.Ed. 243 25
Stephenson v. *Binford*, 287 U.S. 251, 53 S.Ct. 181, 77 L.Ed. 288, 87 A.L.R. 721 36
Stone v. *Smith*, (1893) 159 Mass. 413, 34 N.E. 521 19

U. S. v. *Amsden*, 6 F. 819 (D.C. Ind. 1881) 18
U. S. v. *Baltimore & Ohio R. R. Co.*, 84 U.S. (17 Wall.) 322, 21 L.Ed. 597 25
U. S. v. *Barnett*, 376 U.S. 681, 84 S.Ct. 984, 12 L.Ed.2d 23 10
U. S. Brown, ... U.S. ....., 85 S.Ct. 1707, 14 L.Ed.2d 484 ..... 32, 52, 56, 57, 63
U. S. v. *Carolene Products Co.*, 304 U.S. 144, 152, 58 S.Ct. 778, 82 L.Ed. 1234 66
United States v. *Constantine*, 296 U.S. 287, 299, 56 S.Ct. 223, 80 L.Ed. 233 46
United States v. *Harris*, 106 U.S. 629, 1 S.Ct. 601, 27 L. Ed. 290 25
U. S. v. *Lovett*, 328 U.S. 303, 66 S.Ct. 1073, 90 L.Ed. 1252 ..... 32, 56
U. S. v. *Miller*, 107 F. 913 (D.C. Ind. 1901) 20
U. S. v. *Mississippi*, 380 U.S. 128, 85 S.Ct. 808, 13 L.Ed.2d 717 ..... 34, 62, 67
U. S. v. *Reese et al.*, 92 U.S. (2 Otto) 214, 23 L.Ed. 563 ..... 13, 25, 50
United States v. *Romana*, No. 2, October Term, 1965, November 22, 1965 73
United States v. *Texas*, 339 U.S. 707, 70 S.Ct. 918, 94 L.Ed. 1221 80
Veix v. *Sixth Ward Building & Loan Assn.*, 310 U.S. 32, 60 S.Ct. 792, 84 L.Ed. 1061 68
Washington v. *State*, (1884) 75 Ala. 582, 584, 51 Am.Rep. 479 18
Wieman v. *Updegraff*, 344 U.S. 183, 191, 73 S.Ct. 215, 97 L.Ed. 216 73
Williams v. *Mississippi*, 170 U.S. 213, 18 S.Ct. 583, 42 L.Ed. 1012 43
Wood v. *Fitzgerald*, 3 Or. 568, 580 14
Yick Wo v. *Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 ..... 38, 39, 40, 42, 43

CONSTITUTIONS

Connecticut—Constitution of 1818, as amended in 1845, Art. VIII, Laws of 1874, P. 132 14
Illinois—Constitution of 1847, Art. VI, Sec. 1; Starr and Curtis Anno. Statutes of 1885, P. 99 14
Indiana—Constitution of 1851, Art. II, Secs. 2 and 5, amended 1870 14
Kansas—Constitution of 1859, Art. V, Sec. 1 14
Michigan—Constitution of 1850, Art. VII, Sec. 1; Howell's Anno. Statutes of 1882, P. 55 14
Nevada—Original Constitution, Art. II, Sec. 1; Cutting's Complied Laws of Nevada, 1861-1900, Sec. 207 14
Ohio—Constitution of 1851, Art. V, Sec. 1; Swan & Saylor Code of 1868, P. 336-9; Laws of 1869, P. 424 14
Oregon—Constitution of 1857, Art. II, Sec. 2; Code of Civ. Proc. (1863), Chapter XIII 14
United States Constitution—
Article I, Sections 2 and 4 ..... 6, 9
Article I, Section 9 ..... 32, 33
Article IV, Section 3, Clause 1 ..... 76, 80
14th Amendment 9, 13, 14
15th Amendment 3, 4, 6, 9, 10, 11, 13, 14, 15, 27, 28
17th Amendment 6
19th Amendment 9
24th Amendment 9

OTHER AUTHORITIES

Act of Admission, December 10, 1817, 3 Stat. (L. & B. Ed.) 472 ..... 2, 76
Atlantic Monthly, April issue, 1901, p. 473, Daniel H. Chamberlain 37
Congressional Globe, Volume 39 ..... 13, 16
Enabling Act of March 1, 1817, 3 Stat. (L. & B. Ed.) 348 2, 76
Federalist, No. 59, Madison Ed., p. 279 11
Federalist, No. 78, Madison Ed., pp. 363, 364 55

Hearings before Committee on the Judiciary, U. S. Senate, 89th Congress, S. 1564, Part 1 ..... 11, 23, 29, 31, 48, 61, 67, 69, 71, 74

Hearings before Subcommittee No. 5, Committee on the Judiciary, House of Representatives, 89th Congress, H.R. 6400, Ser. No. 2 ..... 11, 23, 47, 60, 67, 69. 71, 74

House Hearings; House of Representatives, Report No. 439, 89th Congress, 1st Session, pp. 16-19 ..... 11, 27, 61, 74

Rules of the Supreme Court of the United States, Rule 42 (2) and (4) 1

United States Senate Report No. 162, Part 3, 89th Congress, 1st Session, pp. 1, 17 12

Voting Rights Act of 1965, Public Law 89-110 ..... 2, 3, 4, 5, 6, 9, 11, 28, 52

1962 Weaver Constitutional Law Essay Winner; Ritz, "Free Elections and the Power of Congress Over Voter Qualification"; 49 ABA Journal 949 10

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BRIEF FOR THE STATE OF MISSISSIPPI, AMICUS CURIAE

AUTHORITY FOR THE FILING OF AMICUS CURIAE BRIEF

The Court's order of November 5, 1965, in this cause permits the filing of this brief.[1]

1. See also Rule 42 (2) and (4), Rules of the Supreme Court of the United States.

INTEREST OF THE AMICUS

The State of Mississippi became the 20th member of the Union in the year 1817 when it was "*admitted on an equal footing with the original states in all respects whatever.*"[2] There is now pending in the United States District Court for the Southern District of Mississippi, Jackson Division, Civil Action No. 3312, styled "United States of America, Plaintiff, v. The State of Mississippi et al., Defendants", wherein the constitutionality of the Voting Rights Act of 1965, Public Law 89-110, is precisely drawn in issue as to its application to and effect upon the new statutes of the State of Mississippi relating to qualifications required of electors which are set out in Appendix A hereto. This district court action directly and not abstractly raises questions of constitutionality both included within and in addition to those raised by the South Carolina case. Both the sovereignty and equality of the State of Mississippi could be affected by an improper decision of the cause pending here.

REQUEST FOR PERMISSION TO PARTICIPATE IN ORAL ARGUMENT

Pursuant to leave granted in the Court's said order of November 5, 1965, request is hereby made to the Clerk of this Court that the State of Mississippi, as *Amicus Curiae*, be allowed to participate in the oral argument of this cause on January 17, 1965, or as soon thereafter as the State may be heard.

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2. Act of Admission, December 10, 1817, 3 Stat. (L. & B. Ed.) 472. See also Enabling Act of March 1, 1817, 3 Stat. (L. & B. Ed.) 348. The Act of Admission contained a finding that the requirement of the Enabling Act for the establishment of a republican form of government had been met.

SUMMARY OF ARGUMENT

Discussions of the Voting Rights Act of 1965 in the Congress were based on a false premise. The Constitution of the United States grants no powers to the State Governments. That document and its Amendments create a central government of limited enumerated powers, none of which powers grant or include authority to affirmatively establish qualifications for electors in the various states.

The provision of the Voting Rights Act purporting to "suspend" the rights of selected states to use a literacy qualification for voting is particularly unconstitutional in the light of the history of the adoption of the 15th Amendment. That history discloses that the 40th Congress which proposed the 15th Amendment expressly debated the inclusion of prohibitions against education, property and religious tests but finally determined to include only prohibitions against race, color or previous condition of servitude. The history of all provisions of the original Constitution and the other Amendments likewise discloses a complete lack of support for this Act.

The only new right which the 15th Amendment conferred was the right of male citizens to vote if they met State qualifications which did not deny or abridge the right to vote on account of race. Every republican form of government withholds the right of franchise from some portion of its constituents on the basis of its own ideas of proper qualifications; and all courts have long affirmed that the Constitution does not confer suffrage on anyone. In America, voter qualifications have always been based upon the laws of the separate States. The *privilege* of suffrage becomes a *right* to vote only when a citizen comes within the limits of the privilege as defined by State legislation.

The central government can have no legitimate concern with "enlarging representative government" or with "increasing democracy" because, under our Constitution, Congress is not empowered to create or require any particular combination of qualifications for the electors of any State or all of them. When literacy requirements are plain and reasonable and equate with the bare mechanical ability to mark a ballot and comprehend election notices and voting instructions, such requirements cannot discriminate on account of race or color. Such a requirement is so clearly not conflicting with or repugnant to the command of the 15th Amendment that Congress cannot constitutionally create a repugnance by its attempts to legislate "enforcement."

There is a gross anomaly in this legislation. The Voting Rights Act was aimed at correcting *misadministration*. Congress conceded that they were dealing with voting standards which did not, on their face, discriminate on account of race. Therefore when Congress essayed to destroy such laws in some States on the basis that it was the easy, convenient way to stop occasions of misuse in certain counties and parishes, it erred. It was patently improper to despoil South Carolina's requirement that her voters possess marginal literacy, since her "conviction" was based on the allegations of misadministration of *other* laws in *other* States.

There is no such thing as suspended sovereignty. If the power to suspend exists it can be exercised to suspend for 100 years as easily as for five. It can suspend the entire range of qualifications as easily as it can suspend one. Insofar as South Carolina's sovereignty is concerned, there is no difference between the power to suspend and the power to destroy her voter laws.

If a statute be valid and non-discriminatory by its plain terms, it cannot be destroyed or rewritten by an administration which misuses it nor can it be debilitated by Congress' looking beneath the surface of the law in an attempt to divine some improper legislative motive. In order for a statute, which is within a State's power to enact, to be invalid, it must have the *inevitable* effect of operating discriminatorily or it must vest *arbitrary power* in administrative officials. Laws which are capable of a fair, even application and have the effect of operating equally may be vehicles of discrimination in the hands of evil men but, in such cases, correction must work on the men not the statute. This is not to say that misadministration cannot give rise to a constitutional claim of denial of equal protection of law, it is only to state that misadministration can never make a bad statute good nor can it make a good statute bad.

In enacting the Voting Rights Act, Congress exercised purely judicial functions of investigating past facts, making legislative findings of past guilt and then passing a fiat to enforce liabilities on certain states. Such an *advocate-judge* type of function amounts to a legislative trial and is a bill of attainder. The States attained under this act are inflicted with deprivations of their unqualified rights to use valid, constitutional laws and to make reasonable changes in their voter requirements for a five-year period while other states, both with and without past histories of discrimination, are permitted to use and enforce identical laws. Such principles of legislation have recently been condemned by this Court in the field of regulation of Communist activities. *The Constitution is no less available to and protective of the sovereign State of South Carolina than it is to the Communist Party.*

Although the act purports to use a formula to determine its coverage, the "formula" is a *subterfuge* to cover

the fact that Congress was legislating against selected states that were frequently named in its discussions and were arbitrarily chosen for legislative adjudication. The "formula" looks exclusively to the past so that it will not in the future accidentally catch any States other than those singled out for punishment now. The "formula" does not define a standard of conduct that bears a reasonable relationship to proving the claimed wrongdoing, rather, it defines only the States and counties which have been selected.

As drawn, the act clearly violates the right of South Carolina and every other state to *equal footing* as respects political standing and sovereignty within the Union.

Congress exceeded the limits of the Constitution in enacting the Voting Rights Act of 1965.

ARGUMENT

I.

By the Constitution, the People of the Several States Created a Central Government of Limited, Enumerated Powers.

A recurrence to fundamentals is an apt beginning because throughout committee proceedings and debates Congress discussed the constitutional issues raised by this legislation in terms, on the one hand, of its power to legislate under the 15th Amendment and, on the other hand, what was referred to as the power "*granted*" to the states to fix voter qualifications under Article I, Sections 2 and 4, and under the first section of the 17th Amendment. The fallacy of this very basic premise is obvious.

Practically since the Ninth and Tenth Amendments of the Bill of Rights made it explicit, this Court's opinions have repeatedly pointed out that our federalism is not built upon

a central government possessing general powers, surrounded by satellite states occupying subservient governmental roles. *There are no powers granted to the States by the Constitution.* The Court's own words negate the congressional premise and best illustrate the true structure of the United States.

> "... (After the adoption of the Constitution) the sovereign powers vested in the state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States." Per Story, Justice, speaking in *Martin* v. *Hunter's Lessee*.[3]

> "No political dreamer was ever wild enough to think of breaking down the lines which separate the states and of compounding the American people into one common mass. . . . From these (State) conventions the Constitution (of the United States) derives its whole authority. . . . This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted.

> "Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land." Per Marshall, Chief Justice, speaking in *McCulloch* v. *Maryland*.[4]

> "The General Government has no powers but such as are given to it expressly or by implication.

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3. 14 U.S. (1 Wheat.) 304, 325, 4 L.Ed. 97.

4. 17 U.S. (4 Wheat.) 316, 403, 405 and 423, 4 L.Ed. 579.

"The States and their Legislatures have all such as have not been surrendered or prohibited to them." Per Swayne, Justice, speaking in *Hale* v. *Wisconsin*.[5]

"Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the federal government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within power reserved to the states, is invalid and cannot be enforced." Per McReynolds, Justice, speaking in *Linder* v. *United States*.[6]

". . . Though we should think the measure embodies a valuable social plan and be in entire sympathy with its purpose and intended results, if the provisions go beyond the boundaries of constitutional power we must so declare.

"The federal government is one of enumerated powers; those not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states or to the people. The Constitution is not a statute, but the supreme law of the land to which all statutes must conform, and the powers conferred upon the federal government are to be reasonably and fairly construed, with a view to effectuating their purposes. But recognition of this principle cannot justify attempted exercise of a power clearly beyond the true purpose of the grant." Per Roberts, Justice, speaking in *Railroad Retirement Bd.* v. *Alton Railroad Co.*[7]

"It is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative

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5. 103 U.S. 5, 11, 26 L.Ed. 302.

6. 268 U.S. 5, 17, 45 S.Ct. 446, 69 L.Ed. 819, 39 A.L.R. 229.

7. 295 U.S. 330, 346, 347, 55 S.Ct. 758, 79 L.Ed. 1468.

action, and thus gives a permanence and stability to popular government which otherwise would be lacking." Per Brewer, Justice, speaking in *Muller* v. *Oregon*.[8]

The 15th and 19th Amendments prohibit denial or abridgement of the right to vote on account of race and sex. The 24th Amendment proscribes poll and other tax prerequisites in Federal elections. Congress is given the power to enforce these prohibitions. Article I, Section 4, gives Congress permission to make or alter regulations prescribing the times, places and manner of holding elections for Federal Congressmen. Except for the reduction of representation clause of the 14th Amendment, the Constitution of the United States is otherwise silent as to Congressional power to control the elector qualification and voting processes of the several States. Therefore, under proper constitutional precepts the remaining plenary powers belong to the States to fix and change qualifications of electors and to prescribe reasonable procedures and regulations to prevent corrupt practices in voter registration and elections, subject only to the general judicial protections of the Constitution applicable to all State action in the execution and enforcement of its statutory and decisional policies.

The Founding Fathers undertook to establish a constitutional republic and explicitly required that each State be guaranteed a republican form of government. The persuasions urged upon Congress to assume to extend suffrage to citizens of selected states, contrary to the laws of those states, were urgings to create a government of men and not of laws, and outside of the limits of the Federal Constitution. In respondent to these urgings by enacting the Voting Rights Act of 1965, Congress exceeded its constitutional powers.

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8. 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551, 13 Ann. Cas. 957.

II.

The Fifteenth Amendment Does Not Vest Authority in Congress to "Suspend" State Literacy Qualifications.

A.

"Suspension" of the State Literacy Qualifications for Voting Is Not APPROPRIATE under the Fifteenth Amendment in the Light of the Legislative History of That Amendment, Which Discloses That the Fortieth Congress Considered at Length, But Refused to Include in the Amendment, a Prohibition of Literacy Qualifications.

This Court has long adhered to the practice of interpreting provisions of the Constitution in the light of the conditions existing at the time of their enactment.[9] Records of the debates in the Constitutional Convention and contemporary writings, such as The Federalist papers, are often quoted in support of interpretations of the original document. It is equally appropriate to refer to the debates in Congress and ratifying state legislatures to ascertain the true intent and meaning of the several amendments.[10]

There was certainly no thought of authorizing Congressional setting of voter qualifications in the original Constitution. Not even the leading exponent of centralization, Alexander Hamilton, dared to propose federal regulation of State voter qualification. It was Hamilton who

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9. See, e.g., *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) 657, 9 L.Ed. 1233; *Maxwell* v. *Dow*, 176 U.S. 581, 20 S.Ct. 448, 44 L.Ed. 597; *Ex parte Grossman*, 267 U.S. 87, 45 S.Ct. 332, 69 L.Ed. 527, 38 A.L.R. 31; *U. S.* v. *Barnett*, 376 U.S. 681, 84 S.Ct. 984, 12 L.Ed.2d 23.

10. For a thoroughly documented discussion of the original constitution's history in the field of voting qualifications for Federal elections, see the 1962 Weaver Constitutional Law Essay Winner; Ritz, "Free Elections and the Power of Congress Over Voter Qualification"; 49 ABA Journal 949.

proposed that the Constitution be so framed as to give the Central Government power to appoint the Chief Executive of each state, whose appointment would extend during good behavior and who would be vested with the power of absolute veto over any acts of the State legislature. But when it came to the creation of Federal electors, Hamilton wrote:

> "Suppose an article be introduced into the Constitution empowering the United States to regulate the elections for the particular states, would any man have hesitated to condemn it, both as an unwarrantable transposition of power, and as a premeditated engine for the destruction of the state governments?"[11]

The portions of the Voting Rights Act which are involved in this proceeding depend solely on the 15th Amendment for their constitutional foundation.[12]

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11. Federalist No. 59, Madison Edition, p. 279.

12. See, e.g., in Hearings before Subcommittee No. 5, Committee on the Judiciary, House of Representatives, 89th Congress, H.R. 6400, Ser. No. 2:

> "Mr. Katzenbach: As drafted this is based *entirely* on the legislative provision of the 15th amendment which empowers Congress to enact legislation in order to effectuate the substantive prohibitions against discrimination on the ground of race or color." (p. 50)

See, also, pp. 12-19 in the House Hearings; House of Representatives, Report No. 439, 89th Congress, 1st Session, pp. 16-19; Hearings before Committee on the Judiciary, United States Senate, 89th Congress, S. 1564, Part 1:

> This legislation has only one aim—to effectuate at long last the promise of the 15th amendment—that there shall be no discrimination on account of race or color with respect to the right to vote. That is the only purpose of the proposed bill. It is therefore, truly legislation "designed to enforce" the amendment. (p. 20)

> "Senator Ervin: Under this bill the literacy test that applies to the Puerto Ricans in New York would still remain in full force and effect, unaffected, and the literacy test in 34 counties of North Carolina would be outlawed, is that not so?

The legislative history of the proposal of the 15th Amendment makes it transparant that Congress intended by the amendment to forbid *only* the denial or abridgement of the right to vote on account of race, color or previous condition of servitude. Both branches expressly considered and extensively debated making the proposal into a sweeping constitutional veto of state voter qualifications based upon educational, property and religious tests, in addition to race; but after the House refused to concur in a narrowly passed Senate proposal to this effect, the amendment was proposed to the States in its present form. Rather than lengthen this brief, we refer to the outstanding thorough and copiously documented treatise on this subject which is the appendix to the brief filed in this proceeding by the Commonwealth of Virginia, *Amicus Curiae*.

Although we submit that the 14th Amendment was not intended to furnish any base for the portions of the Voting Rights Act which are presented by South Carolina's complaint, and that it could not validly furnish any such base if it had been put forward, we would also respectfully refer the Court to Part I B of the dissent of Mr. Justice

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Attorney General Katzenbach: That is right, Senator because this is based on the 15th amendment. And I do not believe that that situation in New York could be cured under the 15th amendment." (p. 75).

Later, the Puerto Rican provision was added [Section 4 (e)] as was a poll tax provision [Section 10], but neither are involved here.

Hereinafter, for sake of brevity, these records will be referred to as House Hearings, House Report, and Senate Hearings, respectively. To the same effect is United States Senate Report No. 162, Part 3, 89th Congress, 1st Session, pp. 1, 17. See also the Brief filed by the United States in Original Nos. 23, 24 and 25, October Term, 1965, p. 17.

Emphasis in all quotations is added except where otherwise indicated.

Harlan in *Reynolds* v. *Simms*,[13] in which he demonstrates by quotations from the debates of the 39th Congress and references to the various state ratifying actions that the 14th Amendment was in nowise intended to cover *the affirmative fixing of qualifications for electors.* Especially do we assert that the 14th Amendment does not bar the use by any state of a literacy requirement so reasonable that it requires no more than that electors possess the naked manual ability to place the mark they intend upon a ballot.[14] The only relationship the 14th Amendment bears to suffrage is the same which it bears to all types of classifications; namely, it proscribes arbitrary devices and formulae which deny equal protection of law, such as that condemned in *Carrington* v. *Rash*.[15]

If the 14th Amendment were ever to be distorted into authority for *Congress* to demand that all states have the same federally established or approved elector qualifications, the Union of the Constitution would be dead. A greater opportunity to create a self-perpetuating oligarchy could not be envisioned than to give to Congress the power to designate the qualifications of those who could vote them into office. The very fact that the 15th Amendment was adopted recognizes what Section 2 of the 14th Amendment implies, and that is that before the adoption of the 15th Amendment a state could constitutionally limit the franchise to Caucasians.[16]

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13. 377 U.S. 533, 595, 84 S.Ct. 1362, 12 L.Ed.2d 506.

14. History of the 39th Congress which proposed the 14th Amendment shows that that same Congress chose to impose a literacy test on all *new* voters in the District of Columbia, the bulk of whom were Negroes. It further shows that the District bill had the support of most of those who supported the proposal of the 14th Amendment and that the bill was passed over the veto of the then President Johnson. (See Volume 39 of the *Congressional Globe*.)

15. ..... U.S. ....., 85 S.Ct. 775, 13 L.Ed.2d 675.

16. *U. S.* v. *Reese et al.*, 92 U.S. (2 Otto) 214, 23 L.Ed. 563.

The States themselves, in the times of the adoption of the Fourteenth and Fifteenth Amendments, certainly did not evidence any opinion that the Fourteenth Amendment operated to enfranchise Negro citizens. In fact, just the opposite appears. At least sixteen States *outside the Confederacy* restricted the franchise to Caucasians (and in some cases, to Indians). Most of them continued this pattern of racially restricted suffrage after the ratification of the Fourteenth Amendment.[17]

This suit presents a direct confrontation between the Constitution and the Voting Rights Act. Both cannot stand;

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17. *Oregon*-Constitution of 1857 Art. II, Sec. 2; Chapter XIII, Code of Civ. Proc. (1863). Remained in organic law until self-executing provisions of the 15th Amendment took effect. See, *Wood* v. *Fitzgerald*, 3 Or. 568, 580, and *McKay* v. *Campbell*, Infra, Page 19.

Nevada-Original Constitution, Art. II, Sec. 1, not amended until the ratification of Art. XVII in 1880. See Sec. 207, Cutting's Compiled Laws of Nevada 1861-1900.

Kansas-Constitution of 1859, Art. V, Sec. 1. See *Anthony* v. *Halderman*, Infra, Page 19 and cf. *Hunt* v. *Richards*, (1868) 4 Kan. 549.

Michigan-Constitution of 1850, Art. VII, Sec. 1, not amended until ratification of amendment in 1870. Howell's Anno. Statutes of 1882, P. 55.

Illinois-Constitution of 1847, Art. VI, Sec. 1 not amended until ratification of amendment July 2, 1870. Starr and Curtis Anno. Statutes of 1885, P. 99.

Connecticut-Constitution of 1818, as amended in 1845, Art. VIII of amendments, after one unsuccessful attempt in 1869 to enfranchise Negroes the Legislature deleted the word "white" from the Constitution in 1874. Laws of 1874, P. 132.

Ohio-Constitution of 1851, Art. V, Sec. 1, Severe provisions enforcing exclusively white suffrage were adopted on April 16, 1868, Swan & Saylor Code 1868, P. 336-9. May 7, 1869, the Legislature rejected the 15th Amendment reciting that the people of Ohio had recently rejected "Negro suffrage" by a majority of over 50,000 votes. Laws of 1869, P. 424.

Indiana-Constitution of 1851, Art. II, Secs. 2 and 5 not amended until after July 1, 1870. See Davis Supplement to Gavin & Hard Code.

one must fall. To permit the Voting Rights Act to stand will result in sanctioning: (1) that which was rejected by the draftsmen of the Constitution of the United States, (2) that which would have prevented the adoption of that Constitution by the States which did adopt it, and (3) that which the 39th and 40th Congresses refused to include in the prohibitions of either the Fourteenth or the Fifteenth Amendments.

If neither the original document, nor the 14th, nor the 15th Amendment were designed or intended to proscribe State adoption of a fair, reasonable literacy requirement as a qualification for electors, *a fortiori* the action of Congress in adopting the Voting Rights Act in a form which "suspends" just such a qualification in South Carolina and leaves it in use and available for use in other states is without semblance of constitutional support.

B

The New Right Which the 15th Amendment Conferred upon Male Citizens Was the Right to Vote IN ACCORDANCE WITH STATE LAW, Free from Denial or Abridgement on Account of Race.

Although the Fifteenth Amendment has been referred to as creating universal male suffrage, only a moment's reflection is necessary to determine that such a characterization is wholly inaccurate. Some States extend suffrage to 18 year olds, others require the attainment of 21 years of age. Residence requirements, sanity requirements, character requirements, literacy requirements, poll tax requirements, temporary and permanent registration procedures and provisions of corrupt practice acts, all serve to reduce suffrage in varying degrees and to differing extents in the several States. None allows *all* males or *all* citizens the right of the ballot. Almost 100 years ago in

the debates on the 14th Amendment this same thought was expressed on the Senate floor, thus:

> "All the people, or all the members of a State or community, are equally entitled to protection; they are all subject to its laws; they must all share its burdens, and they are all interested in its legislation and government.
>
> "*Notwithstanding this, no State or community professing to be republican allows all its people to vote.* Every one fixes for itself some rule which, in its judgment, will furnish a body of voters or electors who will most wisely and safely represent the wishes and interests of the whole people. The right or franchise of voting has, probably, been more widely extended in these American States than in any other professed republican Government, but in the most liberal of these it has always been confined to a small minority of the whole people. In none of our States have females, or males under twenty-one years of age, ever been allowed to vote.
>
> "*The truth is that the whole system of suffrage of any republican State is wholly artificial, founded upon its own ideas of the number and class of persons who will best represent the wishes and interests of the whole people.*"[18]

The numerous "voting" cases decided by this Court, from *Minor* v. *Happersett*[19] to *McPherson* v. *Blacker*[20] to the *Carrington* case[21] will obviously be extensively discussed by the principal litigants.

The *amicus* feels that it would be of more interest to the Court to supply in this brief a ready reference to the reasoning of other courts which have dealt with this sub-

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18. 39 Congressional Globe (June 5, 1866), p. 2962.
19. 88 U.S. (21 Wall.) 162, 22 L.Ed. 627.
20. 146 U.S. 1, 13 S.Ct. 3, 36 L.Ed. 869.
21. Footnote 15, supra, p. 13.

ject reasonably near to the time of the adoption of the 15th Amendment.

In *McKay* v. *Campbell*,[22] the Court reasoned:

> "The fifteenth amendment above quoted, declares in effect that citizens of the United States and of the several states shall vote in their respective states at all elections by the people, without distinction on account of race, color or previous condition of servitude. But the amendment does not take away the power of the several states to deny the right of citizens of the United States to vote on any other account than those mentioned therein. For instance, notwithstanding the amendment, any state may deny the right of suffrage to citizens of the United States, on account of age, sex, place of birth, vocation, want of property or intelligence, neglect of civic duties, crime, etc. The power of Congress in the premises is limited to the scope and object of the amendment. It can only legislate to enforce the amendment, that is, to secure the right to citizens of the United States to vote in the several states where they reside, without the distinction of race, color or previous condition of servitude."

The Kansas Constitution contained the following article on franchise:

> "Every *white* male person, of twenty-one years and upwards, belonging to either of the following classes, who shall have resided in Kansas six months next preceding any election, and in the township or ward in which he offers to vote at least thirty days next preceding such election, shall be deemed a qualified elector."

On the claim of one denied the ballot, the Kansas Supreme Court wrote:

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22. (D.C. Or., 1870) 16 Fed.Cas. 157, 160, Case #8839.

"The object and effect of the Fifteenth Amendment to the Federal Constitution were to place the colored man in the matter of suffrage on the same basis with the white. It does not give him the right to vote independent of the restrictions and qualifications, such as age and residence, imposed by the State Constitution upon the white man. The colored man, to become a voter, as well as the white man, must be twenty-one years of age, six months a resident of the State, and thirty days a resident of the township or ward. *That amendment operates no further than to strike the word 'white' from the State Constitution.*"[23]

In *U. S.* v. *Amsden*,[24] it was succinctly stated:

"The right to vote in the states comes from the states, while only the right of exemption from discrimination comes from the United States."

The Supreme Court of Alabama in a well documented opinion in *Washington* v. *State*,[25] expressed the following views:

"It may be laid down as a sound proposition, using the language of Mr. Cooley, that 'participation in the elective franchise is a *privilege* rather than a *right*, and it is granted or denied on grounds of general policy; the prevailing view being that it should be as general as possible, consistent with the public safety.'—Cooley's Con. Lim. (5th Ed.) 752 (*599). Mr. Story, without undertaking to say whether it has its foundation in natural right or not, says it 'has always been treated in the practice of nations as a strictly *civil* right, derived from and regulated by each society according to its own free will and pleasure.'—1 Story's Const. (4th Ed.) §§ 579-582. The weight of both reason and of authority, however, as we shall see, sup-

23. *Anthony* v. *Halderman*, (1871) 7 Kan. 50, 60.

24. 6 F. 819 (D.C. Ind. 1881).

25. (1884) 75 Ala. 582, 584, 51 Am.Rep. 479.

port the view that political suffrage is not an absolute or natural right, but is a privilege conventionally conferred upon the citizen by the sovereignty. There can be practically no such thing as universal suffrage, and it is believed that no such theory is recognized among any people. Some are necessarily excluded on the ground of infancy, and the privilege is infinitely varied among others, either upon the ground of public policy, or for reasons that seem arbitrary. No one can lawfully vote under any government of laws except those who are expressly authorized by law. It is well settled, therefore, under our form of government, that the right is one conferred by constitutions and statutes, and is the subject of exclusive regulation by the State, limited only by the provisions of the Fifteenth Amendment to the Federal Constitution, which prohibits any discrimination on account of 'race, color, or previous condition of servitude.'—Cooley's Cons. Lim. (5th Ed.) 752 *et seq.;* McCreary on Elec. (2d Ed.) § 3; Brightley's Elec. Cases, 27; *Huber* v. *Reiley,* 53 Penn. St. 112. The States having the power to confer or to withhold the right, in such manner as the people may deem best for their welfare, it necessarily follows that they may confer it upon such conditions or qualifications as they may see fit, subject only to the limitation above mentioned." (Emphasis by the Court).

The Supreme Court of Massachusetts in *Stone* v. *Smith,*[26] put the rule thus:

"Article 14 of the amendments of the constitution of the United States (section 2) provides that, 'when the right to vote at any election, * * * is denied to any of the male inhabitants of such states, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other cause, the basis of representation therein shall be reduced in the proportion

26. (1893) 159 Mass. 413, 34 N.E. 521.

which the number of such citizens shall bear to the whole number of such citizens, twenty-one years of age, in such state.' This distinctly recognizes the right of a state to deny or abridge the right to vote of the male inhabitants who are 21 years of age, and it is well known that many of the states have, from time to time, by an impartial and uniform rule of prohibition, denied the right to vote to such of their male inhabitants as were thought not to possess the qualifications necessary for an independent and intelligent exercise of the right. Article 15 of the amendments of the constitution of the United States provides that 'the right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.' This is the only prohibition on the states contained in the constitution of the United States which concerns the right to vote."

In *U. S.* v. *Miller*,[27] it was stated:

"It is manifest that no power is conferred on Congress by the second section to enact legislation for the regulation and control of elections generally, nor for securing to the citizens of the United States the right to vote at all elections. The right of suffrage is not inherent in citizenship, nor is it a natural and inalienable right, like the right to life, liberty, and the pursuit of happiness. Unless restrained by constitutional limitation, the legislature may lawfully confer the right of suffrage upon such portion of the citizens of the United States as it may deem expedient, and may deny that right to all others. Before the adoption of the fifteenth amendment, it was within the power of the state to exclude citizens of the United States from voting on account of race, age, property, education, or on any other ground however, arbitrary or whimsical. The constitution of the United States, before the adoption of the fifteenth amendment, in no wise interfered

27. 107 F. 913 (D.C. Ind. 1901).

with this absolute power of the state to control the right of suffrage in accordance with its own views of expediency or propriety. It simply secured the right to vote for members of congress to a definite class of voters of the state, consisting of those who were eligible to vote for members of the most numerous branch of the state legislature. Further than this, no power was given by the constitution, before the adoption of the fifteenth amendment, to secure the right of suffrage to any one. The fifteenth amendment does not in direct terms confer the right of suffrage upon any one. It secures to the colored man the same right to vote as that possessed by the white man, by prohibiting any discrimination against him on account of race, color, or previous condition of servitude. Subject to that limitation, the states still possess uncontrollable authority to regulate the right of suffrage according to their own views of expediency.

* * *

"As we have said, this section is bottomed solely on the fifteenth amendment. It cannot be successfully contended that the amendment confers authority to impose penalties for every conceivable wrongful deprivation of the colored man's right to vote. It is only when the wrongful deprivation is on account of race, color, or previous condition of servitude that congress may interfere and provide for its punishment. If, therefore, the section in question goes beyond that limit, it is unauthorized by the amendment."

In *Karem* v. *United States*,[28] that Circuit held:

"The Fifteenth amendment is therefore a limitation upon the powers of the states in the execution of their otherwise unlimited right to prescribe the qualification of voters in their own elections, and the power of Congress to enforce this limitation is neces-

28. 121 F. 250 (CCA 6th, 1903).

sarily limited to legislation appropriate to the correction of any discrimination on account of race, color, or condition. The affirmative right to vote in such elections is still dependent upon and secured by the Constitution and laws of the state, the power of the state to prescribe qualification being limited in only one particular. The right of the voter not to be discriminated against at such elections on account of race or color is the only right protected by this amendment, and that right is a very different right from the affirmative right to vote."

In *Oregon-Wisconsin Timber Holding Co.* v. *Coos County*,[29] the Supreme Court of Oregon ruled:

"Safely it may be said that the right of suffrage is not an absolute unqualified personal right, but a franchise dependent upon law. None of the law writers include the right to vote among the rights of property or of person. The only restriction on the power of the states to regulate the qualifications of electors is to be found in the fifteenth amendment to the federal Constitution, which provides that the right of citizens of the United States to vote is not to be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude. Subject to this constitutional restriction, the states have exclusive power to regulate the right of suffrage and to determine the class of inhabitants who may vote."

In proposing this legislation and urging its constitutionality to Congress, the Attorney General failed to recognize that the right to vote in State elections is a right to vote which is subject to every condition that a State chooses to impose except those prohibited by the Consti-

29. (1914) 71 Ore. 462, 142 P. 575, 576.

tution. The error of his position is demonstrated in the following quotation:

> ". . . *we* seek to abolish these (literacy) tests because they have been used in those places as a device to discriminate against Negroes.
>
> "It is not this bill—it is not the Federal Government—which undertakes to eliminate illiteracy as a requirement for voting in such states or counties. It is the states or counties themselves which have done so, and done so repeatedly, by registering illiterate or barely literate white persons. . . . It might be suggested that this kind of discrimination could be ended in a different way—by wiping the registration books clean and requiring all voters, white or Negro, to register anew under a uniformly applied literacy test.
>
> "For two reasons, such an approach would not solve, but would compound *our* present problem . . . (1) Negroes have been denied educational opportunity . . . (2) Fair administration of a new literacy test in the relevant areas would, inevitably, disenfranchise not only many Negroes, but also thousands of illiterate whites who have voted throughout their adult lives.
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> *"Our concern today is to enlarge representative government. It is to solicit the consent of all the governed. It is to increase the number of citizens who can vote.* Surely we cannot even purport to act on that concern if, in so doing, we reduce the ballot and correspondingly diminish democracy."[30]

Neither the Attorney General or the Congress, nor the Attorney General and the Congress, have the constitutional

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30. House Hearings, pp. 16 and 17; Senate Hearings, pp. 22 and 23. The remarks of the Attorney General in appearances before Congress are particularly significant in as much as he and his aides were the principal draftsmen and proponents of this legislation.

prerogative of enlarging representative government, nor is theirs separately or collectively the prerogative of increasing democracy. The 15th Amendment power of Congress is solely the power to enact *appropriate* legislation to enforce a prohibition against racial discrimination in voting. It is not a source of power to take over state electoral functions nor is it an authorization to create additional voters, black or white, or both. The Attorney General is certainly not entitled to erect his prejudices into principles.

In surveying the boundaries and limits of the power granted to Congress to enforce the 15th Amendment's self-executing veto of any state law or action which abridges or denies the right to vote on account of race or color, this Court should not give the slightest weight to the Attorney General's wish for more universal suffrage, rather, the judicial assay must be conducted with scrupulous regard for the constitutional necessity for enforcement of every nondiscriminatory qualification for voting set by each of the 50 States of the Union.

C.

There Is No Repugnance or Conflict Between the Power of State to Fix a Literacy Requirement for Electors and the Prohibition of the 15th Amendment.

From time to time during its history this Court has been called on to review legislation with an eye to determining whether or not Congress has exceeded the enumerated powers vested in it by the Constitution and thereby wrongly invaded powers belonging to the States; and in more than a few cases the Court has found that congressional action has transgressed on the Constitution and on

State sovereignty.[31] Thus, the mere fact that Congress decided to enact the Voting Rights Act cannot be treated as conclusive evidence that Congress possesses such power. Otherwise, serious discussion of constitutional limitations must cease.[32]

In *Sinnot* v. *Davenport*,[33] the power of Congress to regulate interstate commerce had been exercised through the medium of a statute requiring the enrollment and license of vessels engaged in the coasting trade at their home ports. The State of Alabama, some fifty years later, passed an act providing for the registration of the names of steamboat owners in Alabama and, acting under its law, detained the New Orleans based steamboat, Bagaby. The validity of the state statute was brought to this Court's attention on a writ of error to the Alabama Supreme Court. This

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31. See, e.g.:

Collector v. *Day*, 78 U.S. (11 Wall.) 113, 20 L.Ed. 122;
U. S. v. *Baltimore & Ohio R. R. Co.*, 84 U.S. (17 Wall.) 322, 21 L.Ed. 597;
United States v. *Reese et al.*, supra; footnote 16, p. 13;
United States v. *Harris*, 106 U.S. 629, 1 S.Ct. 601, 27 L. Ed. 290;
Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835;
James v. *Bowman*, 190 U.S. 127, 23 S.Ct. 678, 47 L.Ed. 979;
Hodges v. *United States*, 203 U.S. 1, 27 S.Ct. 6, 51 L.Ed. 65;
Coyle v. *Smith*, 221 U.S. 559, 31 S.Ct. 688, 55 L.Ed. 853;
Newberry v. *U. S.*, 256 U.S. 232, 41 S.Ct. 469, 65 L.Ed. 913;
Bailey v. *Drexel Furniture Co.*, 259 U.S. 20, 42 S.Ct. 449, 66 L.Ed. 817, 21 A.L.R. 1432;
Burnet v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 52 S.Ct. 443, 76 L.Ed. 815; and
Hopkins Federal Savings & Loan Assn. v. *Cleary*, 296 U.S. 315, 56 S.Ct. 235, 80 L.Ed. 251, 100 A.L.R. 1403.

(The *Reese*, *James* and *Newberry* cases were related to congresssional restrictions on voting action.)

32. *Newberry* v. *U. S.*, Footnote 31, supra, p. 25.

33. 63 U.S. (22 How.) 227, 16 L.Ed. 243.

Court found that the Alabama statute was in direct conflict with the exercise of the congressional power, and pointed out that the supremacy clause operated in case of such conflicts to make the congressional enactment paramount. This decision sets forth the correct approach to resolving such questions as that raised in this action, saying:

> "We agree, that in the application of this principle of supremacy of an act of Congress in a case where the state law is but an exercise of a reserved power, *the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together;* and also that the act of Congress should have been passed in the exercise of a clear power under the Constitution, such as that in question. * * *
>
> "The power of Congress, however, over the subject does not extend further than the regulation of commerce with foreign nations and among the several states. Beyond these limits the states have not surrendered their power over the subject, and they exercise it independently of any control or interference of the general government; . . ."[34]

We submit there is no conflict or repugnance between the power of a state to prescribe a literacy qualification and the prohibition of the 15th Amendment. This Court has uniformly said there is not. In affirming the right of the State of Oklahoma to use a literacy test for voter qualification, the Court pointed out:

> "In fact, the very command of the (15th) Amendment recognizes the possession of the general power (over suffrage qualifications) by the state, since the amendment seeks to regulate its exercise as to the particular

34. Cf. *Florida Lime and Avocado Growers* v. *Paul*, 373 U.S. 132, 929, 83 S.Ct. 1210, 10 L.Ed.2d 248; and *Parker* v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 which reconciled State statutes alleged to conflict with congressional powers.

> subject with which it deals. . . . Thus the authority over suffrage which the states possess and the limitation which the amendment imposes are *coordinate* and *one may not destroy the other without bringing about the destruction of both.*"[35]

Similarly, in the case at bar there is no direct or positive repugnance or conflict between the power of the State of South Carolina to prescribe a fair and reasonable literacy qualification as a prerequisite to voting and the command of the 15th Amendment prohibiting racial discrimination. Since the two powers possessed by the respective sovereigns are without repugnance or conflict, conflict could never be created by what is, truly, *appropriate* legislation in pursuance of congressional powers. Legislation which would create a conflict where none exists is neither appropriate nor constitutional.[36]

Even a brief study of the background and legislative history of this act shows that literacy requirements of the type adopted and enforced by South Carolina weren't intended to be covered by the Act. A canvass of the voter qualifications selected for destruction by this Act, in the words of Congress:

> ". . . reveals that they are vague, arbitrary, hypertechnical or unnecessarily difficult, and have little (if any) bearing upon the capacity to cast an intelligent ballot."[37]

Plain, reasonable requirements that applicants possess the simplest of ability to read and write were really not

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35. *Guinn* v. *U. S.*, 283 U.S. 347, 362, 35 S.Ct. 926, 59 L.Ed 1340. This issue was most recently laid to rest in *Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072.

36. Cf. *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852, 78 A.L.R.2d 1294.

37. House Report, p. 13. The Attorney General used almost the same language in describing the tests which the Act intended to cover. See House Hearings, p. 9.

within the contemplated sphere of action, yet the Act invades State sovereignty of South Carolina to proscribe just such a requirement.

The qualifications now required in Mississippi,[38] (a state which was one of the prime targets for this bill) and those now required in South Carolina,[39] (a State which just got "caught"), show on their face that they are simple, objective and encompass no more than the bare mechanical ability to mark a knowing ballot and comprehend printed notices of elections and voting instructions. Such qualifications are completely compatible with the Constitution and with a fundamentally sound republican government.

There is yet another basis for demonstrating a complete lack of repugnance or conflict. In adopting the Voting Rights Act, Congress was not exercising its power to "regulate" an area of conduct or commerce entrusted to its care full-sway. The 15th Amendment only vests in Congress authority to enforce a limited and definite prohibition—a prohibition which this Court has held to be self-executing. Since the 1st Section of the amendment operates to *ipso facto* write out all racially discriminatory terms and provisions of state voting *laws*, the appropriate subject of congressional enforcement power vested under the 2nd Section must, of necessity, relate to *misadministration*. Thus the appropriate legislation which Congress is empowered to enact should only be directed to correction of misapplication and should not attempt to create, through suspensions of some requirements, a new set of standards which are in conflict with and repugnant to the particular combination of qualifications adopted by the sovereign States.

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38. See Appendix A.

39. See Exhibit B to the Complaint and Appendix A to South Carolina's brief.

The Attorney General candidly admitted that misadministration was truly the basis for the Act.[40]

The demonstration of unconstitutionality of the Congressional Act here in question under this principle becomes even clearer when it is recalled that the asserted ground of conflict between state action and federal power as to South Carolina must have been based upon the assumptions of Congress as to misapplication by registrars in a portion of the counties of *other States* of the statutes of those other states since no widespread misuse of her laws has ever been suggested and no misuse has been proven in any court of law. There is no logic to a rule that would deny the use of a law forbidding prostitution in Houston, Texas, on a finding that officials in Galveston had been guilty of widespread systematic flaunting of that same law. If a law is valid, it ought to be enforced in every part of the jurisdiction in which it is applicable. If officers in one or many places are not correctly enforcing the law or are guilty of outright violations of such a statute, the errant officials ought to be corrected. Just as burning a barn is no practical way to get rid of a rat, so destroying a statute is no constitutional way to correct misadministration.[41]

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40. Attorney General Katzenbach: Yes, all literacy tests are nondiscriminatory as they are written. *The difficulty is in their administration,* Senator.

Senator Ervin: Nevertheless, this would wipe out the literacy test even though the literacy test in words was absolutely nondiscriminatory, and was applied alike to people of all races, wouldn't it?

Attorney General Katzenbach: Yes, it would.

Senator Ervin: And it would do that on the basis of an event which occurred before November 1964.

Attorney General Katzenbach: Yes, it would, Senator.

Senate Hearings, p. 59.

41. See Point III, infra, p. 32.

With even stronger logic we would observe that miscreants in *other States* have no semblance of authority to negate South Carolina's laws and Congress can invest them with none. When Congress casts so large a net that it creates a conflict between State and Federal functions as unnecessarily as was done in the instance of this Act, it clearly leaves every modicum of Constitutional authority behind.

D.

A "Suspension" of the Paramount Power of the States to Fix Reasonable and Non-Discriminatory Voter Qualifications and to Make Reasonable Changes in Such Qualifications Must Be Based upon Authority to Destroy That Power.

There is no such thing as suspended sovereignty.

Any valid claim of authority on the part of Congress to "suspend" state voter qualifications which do not in fact transcend constitutional prohibitions, or any claim of authority to prohibit a state from making reasonable changes in its qualifications without Federal approval, would have to find a basis in a constitutional grant of power broad enough to authorize the total destruction of such state laws. Such authority does not exist in the Constitution.

Legislative power to enforce the prohibition of the 15th Amendment is not analogous to the power to regulate interstate commerce. In the latter instance, the power is complete and plenary as to the entirety of the topic. Let the subject matter be in fact interstate commerce, and Congress is then empowered to take action which occupies all or any part of the "field." Its occupancy can suspend existing state enactments or negate them entirely. It can

proscribe present or future state legislation which is or may be in conflict therewith. For example, in *Parker* v. *Brown*,[42] the Court commented:

> "Occupation of a legislative 'field' by Congress in the exercise of a granted power is a familiar example of its constitutional power to suspend state laws."

On the other hand, when the grant of power is partial or limited and the remainder of the power in the "field" is vested in State sovereignty then Congress must confine itself to action within the ambit of the part of the power granted or its acts are unconstitutional. It is elementary that the grant of authority to establish post offices and post roads does not include power to establish a grocery store. Similarly, the power to enforce a limitation on state sovereignty which forbids that sovereignty to abridge or deny the right to vote on account of race, cannot reasonably be thought to include the power to withdraw from some of the states, through the process of so-called "suspension," their unquestioned right to require their electors to possess bare minimum literacy.

The fact that Congress has chosen to use the ingenious approach of "suspending" rather than frank, direct destruction makes the act nonetheless unconstitutional.[43] Obviously this Court would not permit a criminal prosecution to be conducted in violation of the 5th and 6th Amendments just because the convict was punished by a "suspended" sentence. The power to suspend must include the power to destroy, for if suspension can be

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42. 317 U.S. 341, 350, 63 S.Ct. 307, 87 L.Ed. 315.

43 An unconstitutional act cannot be made valid by a change of descriptive words. *Railway Express Agency* v. *Virginia*, 358 U.S. 434, 79 S.Ct. 411, 3 L.Ed.2d 450. The Attorney General, in proposing this legislation, used the words "suspend" and "abolish" interchangeably. *Senate Hearings*, Part 1, p. 162.

ordered once it can be ordered twice or a hundred times for a day, a week, a year or a hundred years. These are only matters of degree. Congress is granted neither the power to suspend nor the power to destroy as respects the adoption and use of reasonable, non-discriminatory voter qualifications in the several states of the Union.

III.

Neither Misapplication by an Executive Officer nor Improper Motive or Purpose on the Part of a Legislator Can Operate to Negate a Statute Which Is in Fact Constitutionally Valid.

Those proponents of the Voting Rights Act of 1965 who were willing to admit that the states all possess the right and power to establish a reasonable literacy qualification for voting, sought to justify the bill on the basis that selected states should be denied their power because they said administrative officials in some of those states had put such tests to discriminatory uses in the past.

Such a contention is completely illogical. Article I, Section 9, Clause 3, prohibits the enactment by Congress of any Bill of Attainder or *ex post facto* law, yet on more than one occasion the persons occupying the office of Congressmen and Senators and the President of the United States have been found guilty of violating this proscription.[44] It would be ridiculous to assert that the erroneous actions of these officials detracted from the powers which the Constitution granted to the Congress or the President.

The fact that prohibition was honored more widely in its breach than in observance was never claimed to write

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44. See, e.g., *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 18 L.Ed. 366; *U. S.* v. *Lovett*, 328 U.S. 303, 66 S.Ct. 1073, 90 L.Ed. 1252; and *U. S.* v. *Brown*, infra, p. 52. See also Footnote 31, supra, p. 25, as to violations by Congress of other constitutional limits.

the 18th Amendment, or the statutes enacted pursuant to it, off the books. In fact, on the completely contrary presumption, Congress proposed and the States ratified the 21st Amendment to formally bring that era to a close.

Did the long years of discrimination in freight rates against the South in clear violation of Article 1, Section 9, Clause 6, cause that section to be any the less a part and parcel of the Constitution or did these persistent, widespread, invidious administrative misdeeds in any way operate to curtail the power of Congress over other phases of commerce? Of course not. One bad administrator or 1000 bad administrators cannot make a law which is good, bad. One bad Congressman or 500 bad Congressmen could not make a section of the Constitution bad any more than one bad judge or nine bad judges could destroy this Court. The institution, as distinguished from the men who temporarily serve it, must and does remain inviolate, otherwise the very machinery necessary to correct abuses would collapse. There is no such thing as a bad Court or a bad State.

There are also vast differences between the "freezing" principle which some courts of equity have applied to correct inequities of *court determined* discrimination and the five-year burden of proof which this legislative fiat lays on all *presumed guilty* States.

(1) In the Court cases the State or subdivision had been given its day in court to meet the case alleged against it.

(2) The courts maintain continuing jurisdiction of such causes to permit the subdivision to, at any time, show that it has ordered a re-registration of voters on an even basis *in accordance with the State's own statutes.*

(3) No court ever suspended the requirements that a voter possess bare minimum literacy of the type and to the degree required by South Carolina, which is no more than such literacy as is mechanically required to cast a knowing vote.[45]

(4) The courts never deprived the subdivision of simple means of keeping down corrupt practices *pursuant to the provisions of its own laws.*

(5) The court decrees sought to produce *compliance* with State standards and not *destruction* of a portion of those standards. They were designed to secure equal enforcement of standards set by the State, not to nullify those standards by stuffing the voter rolls "to increase democracy" or for any other high sounding reason.

In *Giles* v. *Harris*,[46] this Court ruled that it would not permit the actions of an administrative officer to make a void and unconstitutional statute valid, saying:

> "If the sections of the (State) Constitution concerning registration were illegal in their inception, it would be a new doctrine in constitutional law that the original invalidity could be cured by an administration which defeated their intent."

The converse of this situation has also been approved by this Court in *Duke Power Co.* v. *Greenwood County*.[47] The Fourth Circuit, speaking through Judge Parker, emphasized

45. It is also worthy of note that the relief sought by the Plaintiff in *U. S.* v. *Mississippi*, 380 U.S. 128, 85 S.Ct. 808, 13 L.Ed.2d 717, would have required the Negro applicant to possess the ability to read. Voter testing which requires possession of a 6th grade education level was recommended by the Civil Rights Commission and was maintained in the Federal law, by the Voting Rights Act of 1965 (See Section 15 and 42 USCA 1971).

46. 189 U.S. 475, 487, 23 S.Ct. 639, 47 L.Ed. 909.

47. 91 F.2d 665, 672, Aff. 302 U.S. 485, 58 S.Ct. 306, 82 L.Ed. 381.

that a valid statute could not be voided by an improper administration. Its reasoning was:

> "Confusion in thinking results from the method employed by plaintiff of arguing that the statute is unconstitutional 'as applied by the Public Works Administrator' in making the loan and grant here under consideration. This involves, of course, two questions: (1) The validity of the act of Congress when tested by the Constitution; and (2) the authority of the Administrator when tested by the act of Congress. A statute may not be held void because of the action of an executive officer in applying its provisions. Even when there is an abuse of executive power against which the courts cannot relieve because of their inability to control administrative discretion, the act of Congress under which the action is taken is not rendered invalid any more than it is by action which is absolutely unauthorized. The constitutional validity of the statute must be considered, therefore, without reference to what the Administrator is doing under it."

This Court's affirmance expressly approved this reasoning.

As a direct corollary to this line of authority holding that ministerial or executive officers can neither make a bad statute good nor a good statute bad, this Court has committed itself to the rule that if the Congress or a State Legislature possesses the constitutional power to enact a statute and it exercises that constitutional power to achieve a permitted end, the fact that speculation can be raised as to other motives for the legislation, which could place the Act beyond legislative power, cannot result in making the Act invalid. In *Ellis* v. *U. S.*,[48] the opinion stated:

> "Congress, as incident to its power to authorize and enforce contracts for public works, may require that they shall be carried out only in a way consistent with

48. 206 U.S. 246, 256, 27 S.Ct. 600, 51 L.Ed. 1047, 11 Ann. Cas. 589.

its views of public policy, and may punish a departure from that way. It is true that it has not the general power of legislation possessed by the legislatures of the states, and it may be true that the object of the law is of a kind not subject to its general control. But the power that it has over the mode in which contracts with the United States shall be performed cannot be limited by a speculation as to motives. If the motive be conceded. however, the fact that Congress has not general control over the conditions of labor does not make unconstitutional a law otherwise valid, because the purpose of the law is to secure to it certain advantages, so far as the law goes."

In *Stephenson* v. *Binford*,[49] the Court, speaking of State legislation, said:

> "We need not consider whether the act in some other aspect would be good or bad. It is enough to support its validity that, plainly, one of its aims is to conserve the highways. If the Legislature had other or additional purposes, which, considered apart, it had no constitutional power to make effective, that would not have the result of making the act invalid."

The true rule of statutory assessment is to be found in such cases as *McGowan* v. *Maryland*,[50] *Rast* v. *Van Deman & Lewis Co.*,[51] and *Lindsley* v. *Natural Carbonic Gas Co.*,[52] where this Court has held that if any state of facts reasonably can be conceived that would sustain a statute, it must be upheld. Statutes come to every court clothed with a presumption of constitutionality and correctness and the strong burden is placed on the attacker to demonstrate that the statute does not rest on any reasonable basis but is

49. 287 U.S. 251, 53 S.Ct. 181, 77 L.Ed. 288, 87 A.L.R. 721.

50. 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393.

51. 240 U.S. 342, 36 S.Ct. 370, 60 L.Ed. 679.

52. 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369.

essentially arbitrary. This very rule will doubtless be urged in support of the Voting Rights Act, and rightly so. But if statutes are entitled to this status in the courts, they are none the less entitled to that status in the Congress. If they in fact can be shown to rest on a reasonable basis no congressional conjecture as to bad legislative motive can topple them and no administrator can be held to have subverted them by wrongful application.

Indeed, if litigants were allowed to delve below the surface of legislation to reconstruct supposed, submerged motives and intent, a number of aspersions might be cast on the Voting Rights Act of 1965, as witness the sentiment of the remarks of Daniel H. Chamberlain, a northern Republican who served as Reconstruction Governor of a Southern State. Writing in the *Atlantic Monthly*[53] concerning the adoption of the post Civil War Reconstruction Acts, he said:

> "Hardly anywhere else in recorded debates can be found so surprising a revelation of the blindness of partisan zeal as these discussions disclose. But it may now be clear to all, as it was then clear to some, that underneath all the avowed motives and all the open arguments lay a deeper cause than all others—the will and determination to secure party ascendancy and control in the South and the nation through the Negro vote. If this be a hard saying, let anyone now ask himself or ask the public, if it is possibly credible that the Reconstruction Acts would have been passed if the Negro vote had been believed to be Democratic?"

Only the last word need be changed for purposes of present day speculation. Just why Texas "happened" to be left out and States voting for Goldwater "happened" to be "caught" would also furnish interesting grist for such a mill.

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53 April issue, 1901, p. 473.

When the Voting Rights Act undertakes to translate its judgment of *misadministration* into power to nullify the *law* being administered, it attempts to do that which the courts have ruled cannot be done.

Cases Distinguished

An *amicus* does not customarily have an opportunity to respond to briefs filed by the parties. We would, therefore, beg leave to now distinguish several decisions of this court which have been urged as detracting from the established rule of statutory construction stated above. The first, and probably the most misconstrued precedent in the field of constitutional law, is Mr. Justice Matthews' decision in *Yick Wo* v. *Hopkins*.[54] In this *habeas corpus* action a Chinese laundryman sought freedom from imprisonment under the provisions of ordinances of the City of San Francisco relating to laundries. The Court's description of these ordinances was:

> "They (the ordinances) seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withold consent, not only as to places, but as to persons; so that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of *mandamus* to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility. The power given to them is not confided to their discretion in the legal sense of that term, but

54. 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220.

is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint."

The Court then proceeded to examine the record concerning the application of this unreasonable statute which conferred naked and arbitrary power, and found the record to disclose that more than 200 Chinese had been denied the opportunity to operate laundries, while that same right had been granted to 80 other persons—none of whom were Chinese subjects but all of whom were similarly situated. The Court reasoned that equal protection of law not only forbade discriminatory legislation but also nullified discriminatory administration of a valid law. The words of the Court expressing this second and separate principle were:

> "Though the law itself be fair on its face, and impartial in appliance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. This principle of interpretation has been sanctioned by this court in *Henderson* v. *Mayor of New York*, 92 U.S. 259; *Chy Luny* v. *Freeman*, 92 U.S. 275; *Ex parte Virginia*, 100 U.S. 339; *Neal* v. *Delaware*, 103 U.S. 370; and *Soon Hing* v. *Crowley*, 113 U.S. 703, S. C., 5 Sup. Ct. Rep. 730."

As stated, this was a *habeas corpus* proceeding; so, if Yick Wo's imprisonment was caused by an arbitrary, void statute, he was entitled to be released; and in the alternative, it was equally true that if his imprisonment was caused by misadministration of a fair law, he ought to be free. The Court concluded that both the statute and the administration of the statute had wrongfully caused Yick Wo's imprisonment, stating:

> "The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws, and a violation of the fourteenth amendment of the constitution. The imprisonment of the petitioners is therefore illegal, and they must be discharged."

Not a single intimation or inference can be properly drawn from any part of the Court's decision in the *Yick Wo* case as support for the principle that misadministration of a fair, reasonable law—one which would pass the *mandamus* test proposed in that opinion—could be negated by the whim, or desire, or misdeeds of administrative officials.

In *Lane* v. *Wilson*,[55] the Court considered the validity of an Oklahoma statute which was designed to correct the unconstitutional discrimination condemned in *Guinn* v. *U. S.*[56] The new statute was condemned on *its face* as arbitrarily and unreasonably confined. Its discriminatory result was "*inevitable*". The pertinent portion of the Court's opinion reads:

> "The practical effect of the 1916 legislation was to accord to the members of the negro race who had been discriminated against in the outlawed registration system of 1914, not more than 12 days within which to reassert constitutional rights which this Court found in the Guinn Case to have been improperly taken from them. We believe that the opportunity thus given negro voters to free themselves from the effects of discrimination to which they should never have been subjected was too cabined and confined. The restrictions

55. 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281.

56. Footnote 35, supra, p. 27.

imposed must be judged with reference to those for whom they were designed. It must be remembered that we are dealing with a body of citizens lacking the habits and traditions of political independence and otherwise living in circumstances which do not encourage initiative and enterprise. To be sure, in excep-

*[277]

tional cases a supplemental *period was available. But the narrow basis of the supplemental registration, the very brief normal period of relief for the persons and purposes in question, the practical difficulties, of which the record in this case gives glimpses, *inevitable* in the administration of such strict registration provisions, leave no escape from the conclusion that the means chosen as substitutes for the invalidated 'grandfather clause' were themselves invalid under the Fifteenth Amendment. They operated unfairly against the very class on whose behalf the protection of the Constitution was (t)here successfully invoked."

It would distort this Court's opinion to contend that a reasonably drawn statute, which did not have the *inevitable* effect of discrimination, could be voided by an administration which disregarded its terms. For example, if the statute had provided a 12-year period instead of a 12-day period for the supplemental registration procedures and the Court had found that 12 years was a reasonable period, then one or more state officials had refused to apply the law to Negro voters from and after the 12th day, any such acts of misapplication of the law would be grounds for court relief; but they could not condemn a proper, valid statute.

Davis v. *Schnell*[57] sought a judgment declaring that the Boswell amendment to the Alabama Constitution was *arbitrary* and void. The District Court found that it was, stating, in pertinent part:

57. 81 F.Supp. 872, *Aff.* 336 U.S. 933, 69 S.Ct. 749, 93 L.Ed. 1093.

"The language does not call for a simple, fair or reasonable understanding or explanation. It does not say that the understanding and explanation must be partial, full, complete, definite, proper, fair, reasonable, plain, precise, correct, accurate, or give any rule, guide or test as to the nature of the understanding or explanation that is required. The Amendment does not say to whose satisfaction the applicant must 'understand and explain,' but under the statutes,[5] it must be to the reasonable satisfaction of a majority of the members of one of the 67 boards of registrars that are provided for the 67 counties of Alabama. * * *

"To state it plainly, the sole test is: Has the applicant by oral examination or otherwise understood and explained the Constitution to the satisfaction of the particular board? To state it more plainly, the board has a right to reject one applicant and accept another, depending solely upon whether it likes or dislikes the understanding and explanation offered. To state it even more plainly, the board, by the use of the words 'understand and explain,' is given the *arbitrary power* to accept or reject any prospective elector that may apply, or, to use the language of Yick Wo v. Hopkins, 118 U.S. 356, 366, 6 S. Ct. 1064, 1069, 30 L. Ed. 220, these words 'actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and *arbitrary power* to give or withhold consent * * *' The board has the power to establish two classes, those to whom they consent and those to whom they do not—those who may vote and those who may not. Such *arbitrary power* amounts to a denial of equal protection of the law within the meaning of the Fourteenth Amendment to the Constitution, and is condemned by the Yick Wo and many other decisions of the Supreme Court."

Such a statute could not pass the *mandamus* test set out in *Yick Wo*.[58]

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58. Footnote 54, supra, p. 38.

The Court further found that the administration of this *arbitrary* amendment had unconstitutionally excluded Negro applicants for the franchise, while white applicants with comparable qualifications were being accepted. The District Court concluded that *both* the amendment *and* its administration were unconstitutional. In affirming, this Court cited both *Yick Wo* and *Lane* but called for a comparison of these cases with *Williams* v. *Mississippi*,[59] which distinguished *Yick Wo*. The former Mississippi election statutes discussed in *Williams* were held not to be discriminatory on their face. A showing that evil actions were possible under these statutes was rejected as not sufficient to overturn them. Williams' attorney claimed Williams had been convicted by a jury from which Negroes had been excluded by virtue of a law requiring all jurors to be qualified electors. Thus, the Court correctly pointed out that Williams would have been wrongfully convicted if he had shown that a valid election law had been misapplied in his county, just as his conviction would be erroneous if the laws had been void on their face. The Court certainly did not purport to rule that misadministration could void statutes which were, in fact, valid.

In *Gomillion* v. *Lightfoot*,[60] the Court condemned a statute gerrymandering the rectangular boundaries of an Alabama city into "a strangely irregular 28-sided figure". The lower courts sustained a motion to dismiss.[61] On appeal, this Court reversed, stating:

> If these allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purposes to a math-

59. 170 U.S. 213, 18 S.Ct. 583, 42 L.Ed. 1012.

60. 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110.

61. 167 F.Supp. 405, 270 F.2d 594.

ematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote.

"It is difficult to appreciate what stands in the way of adjudging a statute having this inevitable effect invalid in light of the principles by which this Court must judge, and uniformly has judged, statutes that, howsoever speciously defined, obviously discriminate against colored citizens."

* * *

"While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights."

With deference, we emphasize that the Court in this case was not dealing with a statute which was susceptible of constitutional application. The allegations admitted by the motion to dismiss alleged legislation which was *solely* concerned with unconstitutional racial segregation. The Court spoke in terms of a law which had the *"inevitable"* and *"inescapable human effect"* of despoiling *"only"* Negro voting rights. Neither good nor bad administration could help or hurt it.

In *Nashville, C. & St. L. Ry. Co.* v. *Browning,*[62] the Court held that the State of Tennessee had the power to classify railroad property in a different "pigeonhole" from other property for tax purposes. A large volume of evidence had been offered in the courts below to show that administration of the state's tax statutes in such a manner as to over-tax railroads was the rule and not the exception. The lower court found the proof offered insufficient to over-

62. 310 U.S. 362, 60 S.Ct. 968, 84 L.Ed. 1254.

come the presumption that reviewing officials had acted properly to equalize the taxes. *This Court stated that there was not enough evidence in the record to reverse this finding.* The Court further observed that since the State had a right to classify railroads differently from other property, a railroad could not be heard to complain that classification either by law *or* by practice had harmed them. By way of *obiter dicta,* the Court made the following passing comment in disagreeing with a contention of the State agency that since the statutes of Tennessee provided for fair taxation there could be no basis for a claim of denial of equal protection of *laws* within the meaning of the 14th Amendment.

> "Here, according to petitioner's own claim, all the organs of the state are conforming to a practice, systematic, unbroken for more than forty years, and now questioned for the first time. It would be a narrow conception of jurisprudence to confine the notion of *'laws'* (within the 14th Amendment phrase 'equal protection of the laws') to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice cannot supplant constitutional guarantees, but it can establish what is state *law.* The equal protection clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and true *law* than the dead words of the written text."

What the opinion was saying was that a denial of the 14th Amendment's guarantee of equal protection of *laws* could not be shielded by the fact that the words of a statute or "law" did not justify the misdeeds of an officer. If, over 40 years, the assessors made it a uniform practice to over-assess railroads, the *practice* was a denial of equal protection, just as much as if the inequality were written

on the statute books of the state as a *"law"*. The issue which this comment in the *Nashville* case was discussing is not the question here. We hardily contend that Mr. Justice Frankfurter was not attempting, by way of this *dicta,* to commit this Court to the proposition that any single officer or any number of officials acting over any period of time could make a valid statute bad or an unconstitutional act good. There is a vast difference between ruling that misadministration can give rise to a cause of action or deprive a person of "equal protection of law" and ruling that it can *rewrite* a statute.

Certainly no one of these decisions logically supports an assertion that misuse of valid statutes creates a power in Congress to abolish or suspend the laws of a State. No one of them holds that a statute which is valid on its face can be judicially voided because of an invalid administration or by indulging in subjective psychoanalysis in the field of legislative intent.[63] With the utmost assurance, we contend that a statute which cannot be overturned through the *judicial* process cannot be nullified by *legislative* fiat.

IV.

The Voting Rights Act of 1965 Is a Bill of Attainder

A.

In Enacting the Voting Rights Act Congress Purported to Exercise Purely Judicial Powers and to Vest Legislative Powers in the Courts.

A frank study of the history of this legislation discloses that Congress assumed to (1) conduct a trial-type investigation, (2) make findings, and (3) pass a fiat enforc-

63. Cf. *United States* v. *Constantine,* 296 U.S. 287, 299, 56 S.Ct. 223, 80 L.Ed. 233.

ing liabilities in selected states on the basis of past facts. As indicative of Congressional spirit, we would refer to the remarks of Congressman McCullough to Attorney General Button of Virginia.[64]

> "You know, Mr. Attorney General, we sit here as members of this committee in *two capacities*, or at least, some of us do. Some of us sit here as *advocates* of legislation which we think is necessary to end discrimination in some States, in violation of the 15th amendment.
>
> "We also sit here in the *nature of judges* who are listening to the presentation of a case by the opponents and by the proponents. One of our major duties, if not our major duty, is not only to consider our position as *advocates* but to most seriously take our responsibilities as *judges*."

In performing its "advocate-judge" function, Congress may have acted out of the noblest of motives. Its actions were, nevertheless, absolutely unconstitutional. No matter how high its aims, nor how serious its purposes or how good its intents, they cannot substitute for constitutional power.[65]

It is perhaps incidental that mixed with its attempts to adjudicate, Congress wound up improperly placing legislative functions in the hands of the judiciary in this very same legislation. In the course of the *House Hearings*,[66] Attorney General Katzenbach assured Congressman Lindsay as follows:

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64. House Hearings, p. 569.

65. *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160. No man can be judge in his own case even where he is authorized to exercise judicial power. *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682.

66. P. 105.

"I believe that in setting up the objectives we may have *caught* possibly one State, possibly more, that have not used them (literacy tests) for discriminatory purposes. We may have *caught* a few counties that have not used them for discriminatory purposes.

"I think in general we have *caught* those States and counties which have discriminated and those which have not had the opportunity to come in and show that they have not done so."

In the *Senate Hearings*[67] he exchanged the following comment with Senator Ervin:

"Senator Ervin. Yes. But do you think that the Constitution gives Congress the power to determine by legislative enactment the guiit of a particular State or particular subdivision of the State on the question as to whether it violated the 15th amendment or the 19th amendment?

Attorney General Katzenbach. I think that Congress can set down reasonable standards in that respect, and then in addition it makes it possible for a State to be out from under that by reasonable tests

in the courts as to whether, in fact, that is fair or not."

Later[68] the following remarks passed between Senator Ervin and the Attorney General:

"Senator Ervin. You are striking down the literacy test application in the 34 North Carolina counties in the absence of any evidence. You are striking them down by congressional recital.

Attorney General Katzenbach. Striking them down by congressional recital and offering each and

67. P. 83.

68. *Senate Hearings.*

every one of those counties the opportunity to show that they have not discriminated."

We respectfully submit that it is clear from these quotations that the thrust of the bill was to cast an overly large net of guilt in the hope that it would be validated by a clause letting courts loose any "innocents" that were "caught". Just such a procedure was in these words condemned in *U. S.* v. *Reese*:[69]

> "It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the Judicial for the Legislative Department of the Government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme and beyond the control of the courts; but if it steps outside of its constitutional limitation and attempts that which is beyond its reach, the courts are authorized to and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the States and the people."

Even legislation which is within the express power of a legislative body has been condemned when its sweep is made unnecessarily and unreasonably broad.[70]

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69. Footnote 16, supra, p. 13.

70. Cf. *Aptheker et al.* v. *Secretary of State*, 378 U.S. 500, 508, 84 S.Ct. 1659, 12 L.Ed.2d 992, and the cases there cited.

B.

Legislative Trials Are Abhorrent to the Constitutional Principles of Separation of Powers and Due Process

In *Kilbourn* v. *Thompson*,[71] Mr. Justice Miller, speaking for a unanimous court, stated:

> "It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers entrusted to governments, whether state or national, are divided into the three grand departments of the executive, the legislative and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system, that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other. To these general propositions there are in the Constitution of the United States some important exceptions. One of these is, that the President is so far made a part of the legislative power, that his assent is required to the enactment of all statutes and resolutions of Congress.
>
> This, however, is so only to a limited extent, for a bill may become a law notwithstanding the refusal of the President to approve it, by a vote of two thirds of each House of the Legislature.
>
> So, also, the Senate is made a partaker in the functions of appointing officers and making treaties, which are supposed to be properly executive, by requiring its consent to the appointment of such officers and the

71. 103 U.S. (13 Otto) 168, 190, 26 L.Ed. 377.

ratification of treaties. The Senate also exercises the judicial power of trying impeachments, and the House of preferring articles of impeachment.

In the main, however, that instrument, the model on which are constructed the fundamental laws of the States, has blocked out with singular precision, and in bold lines, in its three primary Articles, the allotment of power to the executive, the legislative, and judicial departments of the government. It also remains true, as a general rule, that the powers confided by the Constitution to one of these departments cannot be exercised by another.

It may be said that these are truisms which need no repetition here to give them force. But while the experience of almost a century has in general shown a wise and commendable forbearance in each of these branches from encroachments upon the others, it is not to be denied that such attempts have been made, and it is believed not always without success. The increase in the number of States, in their population and wealth, and in the amount of power, if not in its nature to be exercised by the Federal Government, presents powerful and growing temptations to those to whom that exercise is intrusted, to overstep the just boundaries of their own department, and enter upon the domain of one of the others, or to assume powers not intrusted to either of them."

In *Hepburn* v. *Griswold*,[72] Chief Justice Chase put the point thus:

"No department of the government has any other powers than those thus delegated to it by the people. All the legislative power granted by the Constitution belongs to Congress; but it has no legislative power which is not thus granted. And the same observation is equally true in its application to the executive and judicial powers granted respectively to the

72. 75 U.S. (8 Wall.) 603, 611, 19 L.Ed. 513.

President and the courts. All these powers differ in kind, but not in source or in limitation. They all arise from the Constitution, and are limited by its terms.

"Not every Act of Congress, then, is to be regarded as the supreme law of the land; nor is it by every Act of Congress that the judges are bound. This character and this force belong only to such acts as are 'made in pursuance of the Constitution'."

To whatever extent congressional action in the form of the Voting Rights Act of 1965 undertakes to exercise a restraint upon and displacement of the judicial power then, to precisely the same extent, that Act is unconstitutional.

In its June 7, 1965, decision in *U. S.* v. *Brown*,[73] this Court struck down an enactment of Congress as an unconstitutional Bill of Attainder. The Court began its discussion with a brief review of the history of that clause in our Constitution.[74] The relationship between the separation of the divisions of the national government and the prohibition of attainders was sharply drawn in this language:

"The Constitution divides the National Government into three branches—Legislative, Executive and Judicial. *This 'separation of powers' was obviously not instituted with the idea that it would promote governmental efficiency.* It was, on the contrary, looked to as a bulwark against tyranny. For if governmental power is fractionalized, if a given policy can be implemented only by a combination of legislative enact-

73. ..... U.S. ....., 85 S.Ct. 1707, 14 L.Ed.2d 484.

74. Another note of historical interest is to be found in the appendix to the opinion of Mr. Justice Black in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 146, 71 S.Ct. 624, 95 L.Ed. 817.

ment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will. James Madison wrote:

> 'The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.'

The doctrine of separated powers is implemented by a number of constitutional provisions, some of which entrust certain jobs exclusively to certain branches, while others say that a given task is *not* to be performed by a given branch. For example, Article III's grant of 'the judicial Power of the United States' to federal courts has been interpreted both as a grant of exclusive authority over certain areas. Marbury v. Madison, 1 Cranch 137, 2 L. Ed. 60, and as a limitation upon the judiciary, a declaration that certain tasks are not to be performed by courts, e. g., Muskrat v. United States, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246. Compare Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153.

The authors of the Federalist Papers took the position that although under some systems of government (most notably the one from which the United States had just broken), the Executive Department is the branch most likely to forget the bounds of its authority, 'in a representative republic * * * where the legislative power is exercised by an assembly * * * which is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions * * *,' barriers had to be erected to ensure that the legislature would not overstep the bounds of *its* authority and perform the functions of the other departments. The Bill of Attainder Clause was regarded as such a barrier. Alexander Hamilton wrote:

'Nothing is more common than for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves. Of this kind is the doctrine of disqualification, disfranchisement, and banishment by acts of the legislature. The dangerous consequences of this power are manifest. If the legislature can disfranchise any number of citizens at pleasure by general descriptions, it may soon confine all the votes to a small number of partisans, and establish an aristocracy or oligarchy; if it may banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, no man can be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government, would be a mockery of common sense.'

Thus the Bill of Attainder Clause not only was intended as one implementation of the general principle of fractionalized power, but also reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness, of, and levying appropriate punishment upon, specific persons.

'Every one must concede that a legislative body, from its numbers and organization, and from the very intimate dependence of its members upon the people, which renders them liable to be peculiarly susceptible to popular clamor, is not properly constituted to try with coolness, caution, and impartiality a criminal charge, especially in those cases in which the popular feeling is strongly excited,—the very class of cases most likely to be prosecuted by this mode."[19]

By banning bills of attainder, the Framers of the Constitution sought to guard against such dangers by limiting legislatures to the task of rule-making. 'It is

the peculiar province of the legislature, to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.' Fletcher v. Peck, 6 Cranch 87, 136, 3 L. Ed. 162.

* * *

"Under our Constitution, Congress possesses full legislative authority, but *the task of adjudication must be left to other tribunals.*"

The Court's observations in this recent decision confirm the precise principles enunciated by Hamilton in the *Federalist Papers.* Some pertinent extracts from this rare document are:

"The standard of good behaviour for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy, it is an excellent barrier to the despotism of the prince: *in a republic, it is a no less excellent barrier to the encroachments and oppressions of the representative body.* And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws. * * *

The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution, I understand one which contains certain specified exceptions to the legislative authority; such for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. *Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void.* Without this, all the reservations of particular rights or privileges would amount to nothing."[75]

75. Federalist, No. 78, Madison Ed., pp. 363, 364.

The fact that Congress was dealing, in the *Brown* case, with an area where it had a wide latitude of power, to-wit, the commerce clause, did not deter the Court from condemning the legislation, stating:

> "Under the line of cases just outlined, § 504 plainly constitutes a bill of attainder. Congress undoubtedly possesses power under the Commerce Clause to enact legislation designed to keep from positions affecting interstate commerce persons who may use such positions to bring about political strikes. In § 504, however, Congress has exceeded the authority granted it by the Constitution. The statute does not set forth a generally applicable rule decreeing that any person who commits certain acts or possesses certain characteristics (acts and characteristics which, in Congress' view, make them likely to initiate political strikes) shall not hold union office, and leave to courts and juries the job of deciding what persons have committed the specified acts or possess the specified characteristics. Instead, it designates in no uncertain terms the persons who possess the feared characteristics and therefore cannot hold union office without incurring criminal liability—members of the Communist Party."

In the present legislation though the words used do not call states by name, certain states have been carefully selected and designated in no uncertain terms.[76] The lack of a precise appellation to the states brought under this act does not cause it to be any the less a Bill of Attainder. The comparable reasoning in *Brown* was expressed in these words:

> "The Attorney General urges us to distinguish *Lovett*[77] on the ground that the statute struck down there 'singled out three identified individuals.' It is of course true that § 504 does not contain the words 'Archie

76. See Points C and D, infra, pp. 69 and 71.

77. *United States* v. *Lovett*, Footnote 44, supra, p. 32.

> Brown', and that it inflicts its deprivation upon more than three people. However, the decisions of this Court, as well as the historical background of the Bill of Attainder Clause, make it crystal clear that these are distinctions without a difference. *It was not uncommon for English acts of attainder to inflict their deprivations upon relatively large groups of people, sometimes by description rather than name.* Moreover, the statutes voided in Cummings and Garland were of this nature. We cannot agree that the fact that § 504 inflicts its deprivation upon the membership of the Communist Party rather than upon a list of named individuals takes it out of the category of bills of attainder."

Under the rule of *Brown* the fact that in this case the deprivations of power to be visited on the "guilty" states are allegedly designed to be preventive rather than retributive, does not keep the visitation of these sanctions from being a form of punishment.

> "The Solicitor General argues that § 504 is not a bill of attainder because the prohibition it imposes does not constitute 'punishment'. In support of this conclusion, he urges that the statute was enacted for preventive rather than retributive reasons—that its aim is not to punish Communists for what they have done in the past, but rather to keep them from positions where they will in the future be able to bring about undesirable events. He relies on American Communications Ass'n v. Douds, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925, which upheld § 9(h) of the Taft-Hartley Act, the predecessor of the statute presently before us. In Douds the Court distinguished Cummings,[78] Garland[79] and Lovett on the ground that in those cases

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78. *Cummings* v. *State of Missouri*, 71 U.S. (4 Wall.) 277, 18 L.Ed. 356.

79. *Ex parte Garland*, Footnote 44, supra, p. 32.

'the individuals involved were in fact being punished for *past* actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct.' Id., at 413, 70 S.Ct. at 691.

"This case is not necessarily controlled by Douds. For to prove its assertion that § 9(h) was preventive rather than retributive in purpose, the Court in Douds focused on the fact that members of the Communist Party could escape from the class of persons specified by Congress simply by resigning from the Party:

'Here the intention is to forestall future dangerous acts; there is no one who may not by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the affidavit. We cannot conclude that this section is a bill of attainder.' Id. at 414, 70 S.Ct. at 692.

"Section 504, unlike § 9(h), disqualifies from the holding of union office not only present members of the Communist Party, but also anyone who has within the *past five years* been a member of the Party. However, even if we make the assumption that the five-year provision was inserted not out of desire to visit retribution but purely out of a belief that failure to include it would lead to *pro forma* resignations from the Party which would not decrease the threat of political strikes, it still clearly appears that § 504 inflicts 'punishment' within the meaning of the Bill of Attainder Clause. It would be archaic to limit the definition of 'punishment' to 'retribution'. Punishment serves several purposes: retributive, rehabilitative, deterrent and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.

"Historical considerations by no means compel restriction of the bill of attainder ban to instances of retribu-

tion. *A number of English bills of attainder were enacted for preventive purposes—that is, the legislature made a judgment, undoubtedly based largely on past acts and associations (as § 504 is) that a given person or group was likely to cause trouble (usually, overthrow the government) and therefore inflicted deprivations upon that person or group in order to keep them from bringing about the feared event.* It is also clear that many of the early American bills attainting the Tories were passed in order to impede their effectively resisting the Revolution.

> 'In the progress of the conflict, and particularly in its earliest periods, attainder and confiscation had been resorted to generally, throughout the continent, as a means of war. But it is a fact important to the history of the revolting colonies, that the acts prescribing penalties, usually offered to the persons against whom they were directed the option of avoiding them, by acknowledging their allegiance to the existing governments.
>
> 'It was a preventative, not a vindictive policy. In the same humane spirit, as the contest approached its close, and the necessity of these severities diminished, many of the states passed laws offering pardons to those who had been disenfranchised, and restoring them to the enjoyment of their property * * *.'

"Thus Justice Iredell was on solid historical ground when he observed, in Calder v. Bull, 3 Dall. 386, 399-400, 1 L.Ed. 648, that 'attainders, *on the principle of retaliation and proscription*, have marked all the vicissitudes of party triumph.'

"We think that the Court in Douds misread United States v. Lovett when it suggested, 339 U.S., at 413, 70 S.Ct., at 691, that that case could be distinguished on the ground that the sanction there imposed was levied for purely retributive reasons."

The attainder effects of the present legislation can be seen even more clearly in the provisions restricting states singled out for inclusion in the act from going about their normal legislative processes in the future. This prohibition is based entirely upon a false presumption of future bad faith and unlawful conduct. This clause, with its effect of prospective punishment, is a part of an act wherein Congress hasn't set up a single legislative standard for conduct subsequent to November, 1964, which is to have the effect of bringing new states under the Act or releasing those "caught" otherwise than by authorizing a judicial proceeding in which such states are denied the presumption of innocence and are inflicted with a practically impossible burden of proof. Attorney General Katzenbach testified before the House Committee.[80]

> "Mr. Katzenbach. The justification for that (Section 5 of the Voting Rights Act covering changes in State law) is simply this: Our experience in the areas that would be covered by this bill has been such as to indicate frequently on the part of State legislatures a desire in a sense to outguess the courts of the United States or even to outguess the Congress of the United States.
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> * * *
>
> "If you look at the past history on this, it seemed to us that the State which had been discriminating in the past should be subjected to some kind of limitations as to any new legislation that it might propose.
>
> * * *
>
> "The Chairman. In other words, your language on page 7, line 25, is all-sweeping and covers the enactment of any law on voter qualifications.
>
> Mr. Katzenbach: That is correct, Mr. Chairman . . ."

80. House Hearings, p. 60.

At the conclusion of these hearings, a report was issued containing the following statement:

> "The prevailing conditions in those areas where the bill will operate offer ample justification for congressional action because *there is little basis for supposing that the States and subdivisions affected will themselves remedy the present situation in view of the history of the adoption and administration of the several tests and devices reached by the bill.*"[81]

In the Senate hearings,[82] the Attorney General's insistence on a legislative conviction appears even stronger.

> "Attorney General Katzenbach. Senator, I think that where there has been prior misconduct and that has been shown, I don't see any difficulty to saying you have to serve a little period of penance here.
>
> "Senator Ervin. Well, also I call attention—
>
> "Attorney General Katzenbach. I will tell you, if some of the States repealed their literacy tests tomorrow, I wouldn't believe it was done in order to stop discriminating. I think it would be done because they had a new device."

Even though § 5 of the Act has not been precisely applied to the State of South Carolina, inasmuch as she has not changed or sought to change her laws, it is nevertheless under attack here in the complaint; and the part that this section plays in the over-all scheme of congressional action should be considered.

Contrary to the Attorney General's firmly expressed disbelief that any good thing can come from South Carolina or the other States attained, it is worthy of more than passing note to point to the actions taken by the Missis-

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81. House Report, p. 19.

82. Senate Hearings, p. 62.

sippi legislature prior to the passage of the Voting Rights Act, which, so far as the legislative history of the Federal act discloses, were not even considered by the Congress.[83]

These new Mississippi statutes (see Appendix A) place beyond the pale of controversy the possibility that any reasonable contention could be made that these new requirements are vague, arbitrary, hypertechnical or unnecessarily difficult or that they do not have a direct bearing upon the capacity to cast an intelligent ballot.

Forcing a State against its will to qualify as electors persons who cannot even write their name does not comport with common sense, let alone constitutional principle. When such a person marks a ballot it is a game of chance and not an intelligent act. What sort of justification can be advanced for forcing that decision on a State such as South Carolina, with 20% of her adult population illiterate, and at the same time permitting the State of Oregon with a 3% illiteracy rate to continue to impose a literacy test as a qualification for voting. Why should the ignorant 3% of Oregonians be denied the ballot when 1/5th of South Carolina's electorate is federally enfranchised and authorized to play a kind of voter's Russian

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83. The author of *United States* v. *Mississippi*, Footnote 45, supra, p. 34, recognized how wrong it was to pass judgment on a state's future conduct on the basis of what its officials might have done in the past. Mr. Justice Black, speaking in *Cameron* v. *Johnson*, ... U.S. ....., ... S.Ct. ....., 14 L.Ed.2d 715, said:

> It is true that we have only recently held that Mississippi must not deny the constitutional right of Negroes to register and vote. *United States* v. *Mississippi*, 380 U.S. 128. *But this, of course, does not mean that no good or valid law could come out of the State of Mississippi.* We should without hesitation condemn as unconstitutional discriminatory voting laws of Mississippi or of any other State. We should with equal firmness, however, approve a law which on its face is designed merely to carry out the State's responsibility to protect people who want to get into and out of the State's public buildings and to move along its highways freely without obstruction.

roulette with that State's government? Lack of educational opportunity is no answer, for it has never been shown, as to South Carolina or as to any of the states "selected", that sufficient schooling to produce the bare minimum literacy required to mark a knowing ballot has not always been available to members of all races. "Literacy and illiteracy are neutral on race, creed and sex, as reports around the world show."[84] When one pauses to consider how patently this Court approved the use of literacy tests in the *Lassiter* decision, the conclusion becomes inescapable that this congressional action was purely and simply a "legislative trial"—precisely the device condemned by Mr. Justice Douglas in his dissent in *Hannah* v. *Larche*.[85] Quoting from Alan Barth's "Government by Investigation", that opinion pointed out that the legislative trial was a device for condemning men without the formalities of due process. Continuing to quote, the decision stated:

> "The legislative trial serves three distinct though related purposes: (1) it can be used to punish conduct which is not criminal; (2) *it can be used to punish supposedly criminal conduct in the absence of evidence requisite to conviction in a court of law;* and (3) it can be used to drive or trap persons suspected of 'disloyalty' into committing some collateral crime such as perjury or contempt of Congress, which can then be subjected to punishment through a judicial proceeding."

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84. *Lassiter* v. *Northampton County Bd. of Elections*, Footnote 35, supra, p. 27. Texas, Florida and other States with heavy Negro populations could adopt voter intelligence requirements now which could be based on a 6th grade educational level, despite the fact that their past schooling has been racially segregated. So could California, where inferior Negro schooling was blamed in the McCone Report for the robberies, arson and murder stemming from the most recent race riot there.

85. 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307.

He then quotes from *Greene* v. *McElroy*:[86]

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. . . . We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him'. This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but, also in all types of cases where administrative and regulatory actions were under scrutiny."

In Justice Douglas' words the opinion continued:

> "What we do today is to allow under the head of due process a fragmentation of proceedings against accused people that seems to me to be foreign to our system. No indictment is returned, no commitment to jail is made, no formal criminal charges are made. Hence the procedure is condoned as violating no constitutional guarantee. Yet what is done is another short cut used more and more these days to 'try' men in ways not envisaged by the Constitution. . . . This is a serious price to pay for adopting a free-wheeling concept of due process, rather than confining it to the procedures and devices enumerated in the Constitution itself. . . . *Men of goodwill not evil ones*

86. 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377.

only, invent, under feelings of urgency, new and different procedure that have an awful effect on the citizen."[87]

In three of the states which were "caught", judgments already rendered by the judiciary are frozen on these attained States and the courts alike for an arbitrary period of five years. Such a procedure not only wrongfully deprives the courts involved of a portion of their judicial power, but it also runs afoul of a problem involved in all anticipatory legislation, which was thus discussed by this Court in *Chastleton Corp.* v. *Sinclair*:[88]

". . . so far as this (legislative) declaration looks to the future it can be no more than prophecy and is liable to be controlled by events. A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed."

Yet under § 4 (a) every Court is arbitrarily deprived of any discretion for a period of five years to make a finding of changed facts. This inflexible proscriptive period certainly runs counter to the effect required to be given to changes of State law (such as have occurred in the

87. Compare the approach of Attorney General Katzenbach when he was challenged as having placed execessive and arbitrary authority in himself to make determinations under Sections 4, 5, 6, 8 and 9:

"Attorney General Katzenbach: Senator, I don't like, as long as I am in this position, having to make the determinations which you regard as unbridled. But frankly I don't know a different way of dealing with it except the way that we have attempted. To go into court all the time and running into all those delays—I think if you balance some discretion on the part of the Attorney General against repeated denials of the right to vote, people who are entitled to vote, it is better to let the Attorney General have a little bit of discretion and get some people voting."

88. 264 U.S. 543, 44 S.Ct. 405, 68 L.Ed. 841.

State of Mississippi) by this Court's decision in *Beli* v. *Maryland*.[89]

The voting processes in these three "frozen" states are to be subjected to the unlawful infusion of a large percentage of persons who are so illiterate they can't read a name on a ballot or write a single letter of the alphabet. These are people described by President Lyndon Johnson as living in a world of darkness. Certainly they are correctly characterized by South Carolina as incompetents in the field of government.

This Act is coldly calculated to punish the convicted States by bringing the e masses of persons into the State's election processes and maintaining them there for a minimum of five years, with the expectation that they will make such inroads into the government that they can never be displaced. Such an attempt to adulterate the very political process that might be expected to right the wrong ought to be especially scrutinized.[90]

Although the 5th Amendment speaks in terms of the rights of a "person", which word does not normally include a State or governmental subdivision, it is hard to conceive that a central government established on the principles of limited, enumerated powers could be held to possess the power to condemn a portion of its creators without affording them a hearing.[91] No party ought to

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89. 378 U.S. 226, 84 S.Ct. 1814, 12 L.Ed.2d 822.

90. Cf. Footnote 4 in *U. S.* v. *Carolene Products Co.*, 304 U.S. 144, 152, 58 S.Ct. 778, 82 L.Ed. 1234.

91. Cf. *Grosjean* v. *American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660, where the Court recognized that while a corporation was not a "citizen" within the privileges and immunities clause, it was a "person" within the meaning of the equal protection and due process clauses. The corporation was permitted to set aside a tax statute which purported to classify newspapers (that Huey Long didn't like) but which the Court could see was just a subterfuge because the legislature knew in advance exactly who would be covered and who wouldn't.

be condemned unheard. No better instrument has been devised for arriving at truth than to give one who is in jeopardy of serious loss, notice of the case against him and an opportunity to meet it. The Voting Rights Act is not a mere instance of name calling by public officials; it is a determination of status.[92] The Congress ought not be immune from the historic requirements of fairness merely because they act, however conscientiously, in the name of Civil Rights or against whole States rather than single officials.

Attorney General Katzenbach assumed the position with Congress that judicial processes were "too slow" when he asked for the novel powers of this Act. To the House he said:

> "What is necessary, what is essential, is a new approach, an approach which goes beyond the *tortuous, often-ineffective pace of litigation.*"[93]

In the Senate Hearings, he said:

> "It (the condition of low Negro voter registration) exists largely because *the judicial process,* upon which all existing remedies depend, *is institutionally inadequate* to deal with practices so deeply rooted in the social and political structure." (p. 9). "In place of fruitless legal maneuvering, the bill offers a workable administrative solution." (p. 14).

We respectfully submit that when officials of the Executive Department stand on the threshold of the opportunity to make proof in a Court of Law that they are entitled to bring to bear the broad new procedural rule made by this Court in *U. S.* v. *Mississippi,*[94] and blandly

92. House Hearings, p. 9.

93. House Hearings, p. 9.

94. Supra, footnote 45, p. 34.

assert to Congress that judicial processes are "inadequate" and "too slow", they do not thereby manufacture any lawful right for Congress to exercise *judicial* power. An emergency, real or imagined, does not create constitutional power.[95] The Attorney General's impatience with due process and his willingness to compromise procedural principles for sake of a quick, easy conviction remain beyond the bounds of the document which is law for rulers and men alike.

The United States is a nation which is unique in recorded time; and, we submit, for a single reason more than any other—it is governed by a written Constitution that does not bend or change with temporal winds and popular cries. This is a nation that is able to contain many views under the same flag. Some citizens believe that the Communist party is a menace to our security and that any process to rid the Country of that "menace" should be used. This Court does not agree that means beyond the Constitution are available.[96] Still other groups are quite dedicated to the belief that the present government of several Southern States are more deserving of opprobrium than the Communists. Both Communists and Southerners are lambasted in most new media, and any person (or court) who asserts that either group is entitled to the shield of the Constitution is likely to incur great wrath. But the plain truth is that short-cuts and deviations which respond only to *vox populi* make awful inroads on the rights of everyone, when, in other times, those precedents cut a different way. *The judicial process*

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95. *Veix* v. *Sixth Ward Building & Loan Assn.*, 310 U.S. 32, 60 S.Ct. 792, 84 L.Ed. 1061.

96. Recent examples are found in *U. S.* v. *Brown*, Footnote 73, supra, p. 52, and *Apthecker* v. *Secretary of State*, Footnote 70, supra, p. 50, and *Albertson, et al.* v. *SACB*, No. 3, Oct. Term 1965, 11/15/65.

is not "institutionally inadequate" in any institution which is compatible with the Constitution. In this case this Court is the first, last and only chance for the State of South Carolina to be accorded the guarantees of that document.

C.

The Act Was Drafted to Apply to Known, Named States and Subdivisions Alone and Its Purported "Formula" Is Merely a Sophisticated Subterfuge.

The rule which forbids sophisticated as well as simple-minded denials of constitutional rights applies to actions by the Congress equally as it does to State legislative action. The states selected for inclusion in this Act were known and often named.[97] Although Attorney General Katzenbach indicated that the 50% figure had been selected because it "is a good round number,"[98] his testimony in the Senate indicates that something more than happenstance was involved in the selection of that "good round number" and the other "trigger" procedures. There he testified:

> "Attorney General Katzenbach. Senator, in searching the test that made a relationship between the 15th amendment and these factors, I think one could, as I have said repeatedly here, fairly make this assumption in this test. If checking that against our figures, it indicated that the States of Mississippi, Louisiana, Alabama were not included within this test, I would have had doubts about the test myself, because I know

97. They are Louisiana, Mississippi, Alabama, Georgia, South Carolina, Virginia and 34 counties in North Carolina. See, e.g., House Hearings, pp. 12, 19, 42, 69, 77, 78, 85, 96, and Senate Hearings, p. 17. Alaska and one county each in Arizona, Idaho and Maine were "caught".

98. House Hearings, p. 26.

those are areas where we have brought repeated cases where we—where we have won cases and we have the facts in other cases which I believe establish violations of the 15th amendment.

"So I am frank to say if, in *experimenting as we did* with various tests to try to get them fair and objective, and with a relationship between that and the 15th amendment, if I had discovered that a test worked out in such a way that it included six States with no Negro populations and eliminated all States with large Negro populations, I would have looked again at the test."

Thus the selected states didn't just happen to come within the "test"—*the "test" was selected to fix those States chosen for conviction.* If one approaches the resolution of the legal question here without guile, one must admit that Congress has legislated against certain designated states and, therefore, congressional power to pass this legislation must forthrightly be tested as though Congress had frankly named the states to be included and pointedly excused all others not so named, for no one not included now can do anything which will bring them under the net. It is wrong and constitutionally false for a prospective voter in South Carolina of any race to be relieved of the requirement of completing an application form required by South Carolina law, when precisely the same form could be required in the State of Florida or Texas, where racial discrimination in voting was declared to be known to exist in testimony given to Congress, and there be enforced whether it had been enacted prior to or after the adop-

tion of the Voting Rights Act, just because the requirement was not on the statute books November 1, 1964.[99]

D.

The Creation of an Irrational, Irrebutable Presumption Results in Legislative Conviction and Forfeiture of Sovereign Rights Without Judicial Proceedings.

Completely without regard to race, color or previous condition of servitude, of those involved, this Act declares that wherever less than 50% of the persons of voting age in a state or subdivision were not in fact registered on a selected *past* date, or when 50% of such persons failed or

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99. The following dialogue bears this out:

"Mr. Cramer: At the top of page 2, the test and device that triggers the approach in this bill, is the device or test which the Attorney General determines was maintained on November 1, 1964.

Mr. Katzenbach: Yes.

Mr. Cramer: Any State hereafter could enact literacy test statutes and not be subject to this bill; right?

Mr. Katzenbach: Yes; if it did not have a literacy test on November 1, 1964, then it could enact a literacy test law.

Mr. Cramer: They could discriminate in the future all they want to and not be subject to this bill.

Mr. Katzenbach: Congressman, I didn't intend to say that literacy tests always discriminate.

Mr. Cramer: I didn't either.

Mr. Katzenbach: I think we are hitting the areas here where there has been discrimination and that that discrimination has been through the use of literacy tests. I don't like literacy tests but I would have no constitutional objection to literacy tests in other States.

Mr. Cramer: Florida, Kentucky, and Tennessee could have literacy tests *tomorrow*, but they would not be subject to this bill.

Mr. Katzenbach: Correct."

House Hearings, p. 107. He could have added Texas and Arkansas also, both of which contain many counties with low voter registration and participation in areas of heavy colored populations, not to mention the District of Columbia. See Senator Ervin's statement in the Senate Hearings, p. 777.

neglected to vote in a designated *past* election, and the state was one of a known, named group of states which on the *past* date required its electors to demonstrate or possess literacy, then such a state is to be stripped of a part of its sovereign powers to enforce its own valid laws. This invalidation remains until the state goes to a Federal Court in Washington, D. C.[100] encumbered by a withdrawal of the presumption of innocence which normally attends every official act, and there assumes and carries the burden of proving that during the past five years there has been no denial or abridgement of the right to vote *on account of race or color* anywhere within its boundaries as the result of enforcement of its literacy requirement. Three states are decreed not to be entitled to even hazard such a burden for five years because *past* legal proceedings in a minor portion of their counties or parishes are made conclusive statewide for five years into the future.

Thus, the presumption is that if a state was a member of the group using specified voter qualifications and if its past statistical record was wrong, it must come in and prove—not what its 1964 statistics truly were—not that such statistics were not the result of denials on account of race or color, or that its 1964 requirements were valid—but, that for five years no denials of the right to vote be-

100. The Act tacitly admits the novelty of moving the cause of action from the place it arose and would normally be brought to Washington when Section 14(d) of the Act permits extra territorial process; but subpoenas for witnesses more than 100 miles from Washington can only be had, on a showing of cause, under an order of the Court. The suggestion that fixing the jurisdiction in Washington for the States was done out of a desire for uniformity of interpretation of the Act is wholly negated by permitting the Attorney General to range over the entire affected area bringing *his* suits in any U. S. District Court which normally has jurisdiction of the selected defendant. Section 12(f). The plain truth of the matter is that the Congress wanted to slam the door of every southern courthouse to litigation by the selected States to discourage and defeat any attempt by them to seek *judicial* relief from the legislative fiat.

cause of race or color have occurred anywhere in the state which were in any way connected with its then valid, yet now condemned, requirements have taken place.

> In *Wieman* v. *Updegraff*,[101] this Court stated: "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power."

When the Attorney General admits that he has cast a presumption calculated to bring in innocents who are given the duty of proving their way out of the entrapment, with the shield of innocence denied to them, he admits that the Voting Right Act is arbitrary and unconstitutional because the presumption he designed is irrational, in addition to being, to all practical effects, irrebuttable. Numerous precedents exist in this Court's past decisions supporting this point. A number of these precedents were collected in the brief filed by the State of South Carolina (see pp. 56 and 57). These and other cases were cited in the most recent pronouncement of the Court on the subject, the case of *United States* v. *Romano*, No. 2, October Term, 1965, November 22, 1965. There the Court held that while presence at a still was a sufficient basis for a rebuttable presumption which would sustain a conviction for carrying on, aiding or abetting the business of distilling,[102] presence at an illegal still site had no reasonable or rational connection sufficient to support a conviction for possession, custody or control of such a still.

Low *registration* figures in areas where members of the Negro race reside in large numbers could conceivably have some relationship to racially discriminatory prac-

101. 344 U.S. 183, 191, 73 S.Ct. 215, 97 L.Ed. 216.

102. See *Gainey* v. *United States*, 380 U.S. 63, ____ S.Ct. ____, ____ L.Ed.2d ____.

tices. Low registration figures of Negroes as a racial group in such a community would be more probative.[103] But to completely eliminate any sort of a connection between the percentages used and racial make up of the population groups to which such figures were applied renders the "formula" of the presumption as irrational as that which was condemned in the *Romano* case. The reason the Voting Rights Act advanced the presumption proposed was that "experiments" showed it "caught" those states desired to be convicted and few enough others to make it have a veneer of fairness yet pass the Congress handily. Perhaps the most crushing proof of the arbitrary notion on which it is based is disclosed by the fact that its proponents would not hazard making it prospective but insisted on limiting its operation only to a past date. It is difficult to put into written words a more pointed demonstration of the *ex post facto* nature and effect of this legislation than was articulated by Mr. McCullough and Mr. Cramer and others in the *House Report* in this way:

> "(The Voting Rights Act's) 50 percent voter-registration test, or automatic triggering device, being *retrospective* in viewpoint, does not consider the actions of a State or political subdivision in the present, but rests upon *past* occurrences. Despite the gross injustices perpetrated by some individuals and governmental bodies, we find the creation of *penalties* today, to be applied in the form of indictments for *yesterday's sins*, to be philosophically undesirable, especially in the light of the delicate Federal-State relationship and the constitutional issues involved. There is no opportunity open to all for the redemption of wrongdoers. Good faith compliance with the spirit and letter

103. It was contended that such racial statistics are hard to compile, but it may be noted that Congress received "evidence" and "testimony" as to such statistics in a number of areas. E.g., House Hearings, pp. 32, 33, 35, 37, 135-257, 587-590; Senate Hearings, pp. 190, 771-773, 850-975, 1175-1445.

of the law after passage of this voting rights bill would be of no avail.

The *'numbers game'* approach, obviously designed to hit a pre-designated target, is clearly an *arbitrary* device unless we are to believe that, without evidence, without a judicial proceeding or a hearing of any kind, a contrived mathematical formula is capable of fairly delineating those States that discriminate on account of race or color and those that do not. As noted earlier, it is conceded by the committee-Celler bill's proponents that the figures used do not purport to show a proportionally low ratio of Negro to white registrants or voters which might reflect a pattern of racial discrimination. In fact, discrimination prohibited by the 15th amendment could continue untouched under the formula so long as 50 percent of the voting age population on November 1, 1964, was registered or voted—*even if they were all whites.* We find it to be quite illogical to declare, on the basis of the formula, that Louisiana is guilty of discriminating since it had only 47.3 percent of the eligible population voting in the 1964 election, while Hawaii with 52 percent voting is deemed innocent (subcommittee transcript, p. 29). Meanwhile, Texas escapes censure, although it had only 44 percent participation. Yet, as a result of this arbitrary calculation, a State's voting qualifications are suspended until it comes to a selected court in the District of Columbia and establishes the fact that its 'tests and devices' were never used during the past 5 years to deny or abridge the right to vote.

The fair and effective enforcement of the 15th amendment calls for precise identification of offenders, not the *indiscriminate scatter-gun technique* evidenced in the 50 percent test. Where local election officials practice discrimination, a Federal remedy should be readily available to be swiftly administered even if 99 percent of the eligible voters are properly registered or voted. However, the committee-Celler bill with its 50 percent test would engulf whole States in a tidal wave of Federal control of the election process, even

though many of the counties or parishes within that State may be acknowledged by all to be absolutely free of racial discrimination in voting."[104]

V.

The Constitution Does Not Permit the Classification of States.

Article IV, Section 3, Clause 1 of the Constitution provides:

> "New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress."

The decisions of this Court have consistently emphasized that this permission to admit new states was a permission to admit such states on a basis of equality with the states that originally formed the Union. The admitting acts of the various states have uniformly provided that they are to be admitted on the same basis as the original states in all respects whatever.[105]

A little over a year after Mississippi was admitted to the Union this Court, in *McCullough* v. *Maryland*, supra (p. 410 of 17 U.S.), stated:

> "In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other. We can-

104. House Report, p. 45.

105. See, e.g., the Enabling and Admitting Acts for the State of Mississippi, supra, p. 2.

not comprehend that train of reasoning which would maintain that the extent of power granted by the people is to be ascertained, not by the nature and terms of the grant, but by its date. Some state constitutions were formed before, some since that of the United States. We cannot believe that their relation to each other is in any degree dependent upon this circumstance. Their respective powers must, we think, be precisely the same as if they had been formed at the same time."

In *Pollard, et al.* v. *Hagan, et al.*,[106] the Court had occasion to discuss the status of states admitted out of the territories ceded by the original states of Virginia and Georgia (which includes Mississippi). The Court there pointed out that the deeds of cession contained an express stipulation as to any new States formed out of the land cedes that "such State shall be admitted by its delegates into the Congress of the United States, on an equal footing with the original states in all respects whatever." In discussing such a new State's sovereignty, the Court stated:

"The right of Alabama and every other new State to exercise all the powers of government, which belong to and may be exercised by the original States of the Union, must be admitted, and remain unquestioned, except so far as they are temporarily, deprived of control of the public lands."

In *Permoli* v. *Municipality No. 1 of the City of New Orleans*,[107] the Court held that the act admitting the State of Louisiana had authorized the framing of a State Constitution which established, among other things, a republican government. In discussing the relationship of the new State to the ordinance of Congress which formerly governed the

106. 44 U.S. (3 How.) 212, 224, 11 L.Ed. 565.

107. 44 U.S. (3 How.) 589, 610, 11 L.Ed. 739.

Territory before the State was created, the opinion provided:

> "So far as they conferred political rights, and secured civil and religious liberties (which are political rights) the laws of Congress were all superseded by the State Constitution. Nor is any part of them in force, unless they were adopted by the Constitution of Louisiana as laws of the State. It is not possible to maintain that the United States hold in trust, by force of the ordinance, for the people of Louisiana, all of the great elemental principles, or any one of them, contained in the ordinance, and secured to the people of the Orleans territory during its existence. It follows, no repugnance could arise between the ordinance of 1787 and an act of the legislature of Louisiana, or a city regulation founded on such act;"

This reasoning was based upon the fact that Congress had admitted the State "on an equal footing with the original states in all respects whatever."

In speaking of the status of admission of the State of Illinois in *Escanaba and Lake Michigan Transportation Co.* v. *City of Chicago*,[108] this Court stated:

> "On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original states. She was admitted, and could be admitted, only on the same footing with them. The language of the act of admission is, 'on an equal footing with the original states *in all respects whatever*.' 3 St. 536. Equality of constitutional right and power is the condition of all the states of the Union, old and new." (Emphasis by the Court.)

The leading case in this field and the one which laid the principle to rest so strongly that it has not substan-

108. 107 U.S. 678, 2 S.Ct. 185, 193, 27 L.Ed. 442.

tially arisen since is *Coyle* v. *Smith*,[109] where the Court stated:

> "The power is to admit 'new states into *this* Union.' (Emphasis by the Court.)
>
> 'This Union' was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new states, might come to be a union of states unequal in power, as including states whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the Constitution alone, but in respect to new states, enlarged or restricted by the conditions imposed upon new states by its own legislation admitting them into the Union; and, second, that such new states might not exercise all of the powers which had not been delegated by the Constitution, but only such as had not been further bargained away as conditions of admission.
>
> The argument that Congress derives from the duty of 'guaranteeing to each state in this Union a republican form of government,' power to impose restrictions upon a new state which deprive it of equality with other members of the Union, has no merit. It may imply the duty of such new state to provide itself with such state government, and impose upon Congress the duty of seeing that such form is not changed to one anti-republican,—Minor v. Happersett, 21 Wall. 162, 174, 22 L. ed. 627, 630,—but it obviously does not confer power to admit a new state which shall be any less a state than those which compose the Union."

109. 221 U.S. 559, 31 S.Ct. 688, 66 L.Ed. 853.

In *United States* v. *Texas*,[110] the Court reasoned that what is now referred to as the "equal footing" clause (Article IV, Section 3, Clause 1, supra) could not be meant to overcome differences in area, location, geology and latitude which create diversity in economic aspects, rather it was reasoned that the clause was intended to create "parity as respects *political standing and sovereignty.*"[111]

Any classification of states such as Congress has attempted to make in the Voting Rights Act is bound to destroy the parity of political standing and sovereignty of the states. Such a destruction of equality is contrary to the "equal footing" clause of the Constitution. South Carolina has the same right to have a literacy test that Oregon does. She cannot constitutionally be required to come to the District of Columbia to prove her entitlement to make or enforce such a requirement for her electors.

CONCLUSION

Congress exceeded the limits of the Constitution in enacting the Voting Rights Act of 1965.

Respectfully submitted,

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110. 339 U.S. 707, 70 S.Ct. 918, 94 L.Ed. 1221.

111. P. 716 of 339 U.S. Cf. *McCabe* v. *Atchison, Topeka & Santa Fe Railway Co.*, 235 U.S. 151, 35 S.Ct. 69, 59 L.Ed. 169.

The Mississippi Code, as amended June 30, 1965, provides in pertinent part:

3209.6. FORM OF APPLICATION BLANKS.

Applications for registration as electors of this state shall be made upon a form in the following words and figures:

APPLICATION FOR REGISTRATION

Under penalty of perjury, write the following answers:

1. What is your full name? .....

2. What is your date of birth? .....

3. Are you a citizen of the United States? .....

4. What is your present residence address and each place you have resided during the past two years, stating when you lived at each place?

   a. Present Address: .....;
   From ..... to date.

   b. Previous Address: .....;
   From ..... to .....

   c. Previous Address: .....;
   From ..... to .....
   (If you need additional space use the back side of this form.)

5. Are you a minister of the gospel in charge of an organized church, or his wife legally residing with him? .....

6. Have you ever been convicted of the crime of bribery, theft, arson, obtaining money or goods

under false pretense, perjury, forgery, embezzlement or bigamy? .....

After you have answered 1 through 6 above, sign the following oath in the presence of the registrar or deputy registrar.

"STATE OF MISSISSIPPI,
County of .....:

I do solemnly swear (or affirm) that I am twenty-one years old (or I will be before the next election in this county), and that I will have resided in this state two years and my present election district of this county one year next preceding the ensuing election (or if it be stated above that the person proposing to register is a minister of the gospel in charge of an organized church, or his wife legally residing with him, then it will be sufficient to aver therein two years' residence in the state and six months in said election district), and am now in good faith a resident of the same, and that I am not disqualified from voting by reason of having been convicted of any crime named in the constitution of this state as a disqualification to be an elector; that I have truly answered all questions propounded to me in the foregoing application for registration; and that I will faithfully support the Constitution of the United States and of the State of Mississippi, and will bear true faith and allegiance to the same. So help me God.

Applicant sign here: .....

Sworn to and subscribed before me, this ..... day of ....., 19.....

.....
Registrar or Deputy Registrar"

SEC. 2. The boards of supervisors are authorized to make proper allowances for office supplies reasonably necessitated by this act.

SEC. 3. If any clause, sentence, paragraph, or part of this act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof, directly involved in the controversy in which judgment shall have been rendered.

SEC. 4. This Act shall take effect and be in force from and after its passage.

3209.7. PERSON NOT TO REGISTER UNLESS HE CAN READ AND WRITE—COMPLETION OF APPLICATION FOR REGISTRATION—AFFIDAVIT OF PHYSICAL DISABILITY—PRESERVATION OF RECORDS.

A person shall not be registered unless he is able to read and write. The county registrar shall make available during regular office hours blank applications for registration in the form required by law, to those persons resident in his county who desire to apply for registration, and shall administer the oath to applicants completing such form. The application shall be completed in the handwriting of the applicant. In case an applicant is physically disabled, the registrar shall provide such applicant with any assistance necessitated by such disability, and an affidavit showing the nature of such disability shall be attached to the registration form. The registrar, or any successor in office, shall file and retain in his office all applications for registration, together with any affidavits of disability received in connection therewith, for a period of two years from the date thereof.

SEC. 2. If any clause, sentence, paragraph, or part of this act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this act,

but shall be confined in its operation to the cause, sentence, paragraph, or part thereof, directly involved in the controversy in which judgment shall have been rendered.

SEC. 3. This Act shall take effect and be in force from and after its passage.

3212. REGISTRAR TO REGISTER VOTERS.

Every person entitled to be registered as an elector in compliance with the laws of this state shall sign his name in the column provided therefor on the registration book and thereupon shall be registered by the registrar on the registration books of the election district of the residence of such person.

SEC. 2. If any clause, sentence, paragraph, or part of this act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof, directly involved in the controversy in which judgment shall have been rendered.

SEC. 3. This Act shall take effect and be in force from and after its passage.

3235. WHO ENTITLED TO VOTE.

Every inhabitant of this state, except idiots, insane persons, and Indians not taxed, who is a citizen of the United States, twenty-one (21) years old and upwards, who has resided in this state two (2) years, and one year in the election district or city, town or village in which he offers to vote, and who is able to read and write and who shall have been duly registered as an elector by an officer of this state under the laws thereof, and who has never

been convicted of bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement, or bigamy, and who has paid all poll taxes which may have been legally required of him, and which he has had an opportunity to pay according to law, for the two (2) preceding years, and who shall produce to the officers holding the election satisfactory evidence that he has paid such poll taxes on or before the first day of February of the year in which he shall offer to vote, shall be a qualified elector in and for the election district or city, town or village of his residence, and shall be entitled to vote at any election held not less than four (4) months after his registration; but any minister of the gospel, in charge of an organized church, or his wife legally residing with him, shall be entitled to vote after six (6) months' residence in the election district, city, town or village, if otherwise qualified. No others than those above included shall be entitled, or shall be allowed, to vote at any election; provided, that a person unable to read or write by reason of physical disability shall, if otherwise qualified, nevertheless be entitled to vote.

SEC. 2. All laws and parts of laws in conflict with this statute are hereby repealed.

SEC. 3. If any clause, sentence, paragraph, or part of this act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof, directly involved in the controversy in which judgment shall have been rendered.

SEC. 4. This Act shall take effect and be in force from and after its passage.